

Exhibit 35

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6
7 SEARS HOLDINGS CORPORATION,

8
9 Debtor.

10 - - - - - x

11
12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15
16 April 18, 2019

17 10:46 AM

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19
20
21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24
25 ECRO: UNKNOWN

1 HEARING re Debtors Motion to (A) Enforce Asset Purchase
2 Agreement and Automatic Stay Against Transform Holdco LLC
3 and (B) Compel Turnover of Estate Property, and (II)
4 Response to Transform Holdco LLCs Motion to Assign Matter to
5 Mediation (related document(s)2766) (document #2796)

6
7 HEARING re Motion to Compel Payment of Post-Petition Rent
8 and Related Lease Obligations Pursuant to 11 U.S.C. §§
9 105(a), 363(e), 365(d)(3) and 503(b)(1)(A) and to Pay All
10 Subsequent Amounts Owed On a Timely Basis filed by Robert L.
11 LeHane on behalf of Trustees of the Estate of Bernice Pauahi
12 Bishop (document #2414)

13
14 HEARING re Initial Supplemental Brief in Response to
15 Debtors' Motion to (A) Enforce Asset Purchase Agreement and
16 Automatic Stay Against Transform Holdco LLC and (B) Compel
17 Turnover of Estate Property, dated April 2, 2019 (REDACTED)
18 (related document(s)2796) filed by Abena Mainoo on behalf of
19 Transform Holdco LLC (document #3011)

20
21 HEARING re Debtors' Supplemental Memorandum of Law in
22 Further Support of Their Motion to Enforce the Automatic
23 Stay (related document(s)2796, 2864) (document #3079)

24
25

1 HEARING re Transform Holdco LLC's Supplemental Reply Brief
2 in Response to Debtors' Motion (A) Enforce Asset Purchase
3 Agreement and Automatic Stay Against Transform Holdco LLC
4 and (B) Compel Turnover of Estate Property

5 [REDACTED] (related document(s)3079, 2796) filed by Abena
6 Mainoo on behalf of Transform Holdco LLC. (document #3156)
7

8 HEARING re Transform Holdco LLC's Response to Debtors' (I)
9 Motion to (A) Enforce Asset Purchase Agreement and Automatic
10 Stay Against Transform Holdco LLC and (B) Compel Turnover of
11 Estate Property and Reply in Further Support of Its Motion
12 to Assign Matter to Mediation (related document(s)2766,
13 2796) filed by Abena Mainoo on behalf of Transform Holdco
14 LLC. (document #2864)
15

16 HEARING re Joinder of the Official Committee of Unsecured
17 Creditors to Debtors (I) Motion to (A) Enforce Asset
18 Purchase Agreement and Automatic Stay Against Transform
19 Holdco LLC and (B) Compel Turnover of Estate Property, and
20 (II) Response to Transform Holdco LLC's Motion to Assign
21 Matter to Mediation (related document(s)2796) filed by Ira
22 S. Dizengoff on behalf of Official Committee of Unsecured
23 Creditors of Sears Holdings Corporation, et al. (document
24 #2808)
25

1 HEARING re Motion of Wilmington Trust, National Association,
2 as Indenture Trustee and Collateral Agent to Prohibit or
3 Condition Debtors' Continued Use of Collateral, Including
4 Cash Collateral filed by Edward M. Fox on behalf of
5 Wilmington Trust, National Association (document #3050)

6
7 HEARING re Objection / Joinder of the Official Committee of
8 Unsecured Creditors to Debtors' Objection to Motion of
9 Wilmington Trust, National Association, as Indenture Trustee
10 and Collateral Agent, to Prohibit or Condition Debtors'
11 Continued Use of Collateral, Including Cash Collateral
12 (related document(s) 3198) (document #3210)

13
14 HEARING re Motion of Debtors to Compel Turnover of Estate
15 Property filed by Sunny Singh on behalf of Sears Holdings
16 Corporation (document #2715)

17
18 HEARING re Community Unit School District 300's (I)
19 Objection to Debtors' Motion to Compel Turnover of Estate
20 Property and (II) Reply to Debtors' Objection to Motion of
21 Community Unit School District 300 for Relief From the
22 Automatic Stay or, in the Alternative, Abstention (Related
23 Documents 652, 1280, 2715 and 2717) (related
24 document(s) 2715, 652) filed by Allen G. Kadish on behalf of
25 Community Unit School District 300 (document #2996)

1 HEARING re Supplemental Objection to Debtors' Motion to
2 Compel Turnover of Estate Property (related document(s) 2996,
3 2715) filed by Allen G. Kadish on behalf of Community Unit
4 School District 300 (document #3247)

5
6 HEARING re Motion of Community Unit School District 300 for
7 Relief from the Automatic Stay (document #652)

8
9 HEARING re Debtors' Objection (document #1280)

10
11 HEARING re Motion of Community Unit School District 300 for
12 Relief From the Automatic Stay or, in the Alternative, for
13 Abstention filed by Allen G. Kadish on behalf of Community
14 Unit School District 300 (document #652)

15
16 HEARING re Motion to Compel Payment of Post-Petition Rent
17 and Related Lease Obligations Pursuant to 11 U.S.C. §§
18 105(a), 363(e), 365(d)(3) and 503(b)(1)(A) and to Pay All
19 Subsequent Amounts Owed On a Timely Basis filed by Robert L.
20 LeHane on behalf of Trustees of the Estate of Bernice Pauahi
21 Bishop (document #2414)

22
23 HEARING re Objection of Transform Holdco (document #2832)

1 HEARING re Debtors' Response and Reservation of Rights (
2 document #3169)

3
4 HEARING re Response of Trustees of the Estate of Bernice
5 Pauahi Bishop (document #2922)

6
7 HEARING re Motion to Compel Debtor in Possession to Assume
8 and Assign, Or, Alternatively, to Reject, Unexpired Lease on
9 Real Property (Sears Contract No. S8729-73-A) by Dedeaux
10 Inland Empire Properties filed by William P Fennell on
11 behalf of Dart Warehouse Corporation (document #2980)

12
13 HEARING re Debtors' Objection (document #3168)

14
15 HEARING re Motion for Payment of Administrative Expenses
16 Pursuant To 11 U.S.C. §503(a), 503 (b) (1) (A), and 507(a) (2)
17 for Mauldin At Butler LLC, Other Professional, period:
18 1/1/2018 to 12/31/2018, fee:\$, expenses: \$88,660.08. filed
19 by Mauldin At Butler LLC (document #2690)

20
21 HEARING re Debtors' Objection (document #3163)

22
23 HEARING re Reply of Mauldin at Butler, LLC (document #3225)

24
25

1 HEARING re Motion of Debtors for Entry of an Order
2 Authorizing and Approving Procedures for Settling De Minimis
3 Affirmative Claims and Causes of Action of the Debtors (
4 document #3031)

5
6 HEARING re Limited Objection of Wilmington Trust, National
7 Association (document #3144)

8
9 HEARING re Motion for Payment of Administrative Expenses
10 Motion of Winners Industry Co., Ltd. for Allowance and
11 Payment of Administrative Expense Claims. filed by Winners
12 Industry Co., Ltd. (document #1386)

13
14 HEARING re Notice of Agenda of Matters Scheduled for Hearing
15 on April 18, 2019 at 10:00 a.m.

16
17 HEARING re Debtors' Objection (document #2839)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Okay, good morning. In re Sears
3 Holdings Corporation et al?

4 MR. SCHROCK: Good morning, Your Honor. Ray
5 Schrock, Weil Gotshal on behalf of the Debtors. Your Honor,
6 before we get started and move into the main agenda, I just
7 had a quick update for the Court and parties in interest and
8 some recent case developments.

9 THE COURT: Okay.

10 MR. SCHROCK: First, Your Honor, I want to report
11 that the Debtors have selected two firms in consultation
12 with the Creditors' Committee to pursue preference
13 recoveries. This is following a competitive process, you
14 know, working with the parties. And we think what we have
15 are market leading recovery -- or market leading pricing for
16 contingency fees on those, so the ASK firm and
17 Acumen/(indiscernible) that have been selected by the estate
18 to pursue those recoveries. And I believe, you know, the
19 Committee and the Debtors are both supportive of those.

20 THE COURT: And these are basically preference
21 claims?

22 MR. SCHROCK: These are just preference claims,
23 Your Honor.

24 THE COURT: Okay.

25 MR. SCHROCK: And you know, there's -- there were

1 roughly \$3.8 billion of transfers in the 90 days before the
2 cases were commenced. When you take out some of the low-
3 hanging fruit, the exclusions, you know, it's roughly \$1.9
4 billion. And you know, we do have some estimates that you
5 know, we believe will be recoverable, but we do think that
6 those firms getting started, getting demand letters out soon
7 and starting to get that process moving is crucial to, you
8 know, the plan process and driving the estate's recoveries.

9 THE COURT: Okay. Hopefully that process won't be
10 finished by the time our plan is confirmed in the case, so
11 obviously, I would hope you -- I would consider how to
12 integrate that into a plan --

13 MR. SCHROCK: Yeah.

14 THE COURT: -- a post-effective date plan
15 structure.

16 MR. SCHROCK: We are, Your Honor, we would
17 contemplate that those firms would ultimately be retained by
18 a post-consummation trust born under the Chapter 11 plan.
19 And you know, those would continue also to work of course
20 with chambers so that we don't necessarily cause too much
21 trauma to your docket as well as we would put that protocol
22 together.

23 THE COURT: Okay. Well, and that's the other
24 point I just wanted to raise. I don't know how many
25 potential defendants there are, but clearly, in other cases,

1 the adoption of sort of the overall procedures for dealing
2 with these types of claims has been successful, sort of
3 along the lines of what you've done with personal injury
4 claims in other contexts, so hopefully -- I hope they will
5 be considering that as a possibility, at least.

6 MR. SCHROCK: We are, Your Honor, and we'll work
7 on the protocol and hope to get it through with the
8 Committee and get it in front of Your Honor, the
9 (indiscernible) Committee that is, and get it in front of
10 Your Honor here in short order.

11 THE COURT: Right. It's obviously something you
12 want to discuss with the Committee.

13 MR. SCHROCK: Of course, very much.

14 THE COURT: Okay, all right.

15 MR. SCHROCK: Your Honor, a quick Chapter 11 plan
16 update. Following several weeks of discussions with the --
17 with certain Creditors and the Unsecured Creditor's
18 Committee, we have filed the Chapter 11 plan and a company
19 disclosure statement to wind up the affairs of these Chapter
20 11 cases.

21 A few notes on this point. As everybody I'm sure
22 is very aware that the cases are -- they're expensive. The
23 administrative costs are significant. There's only one way,
24 we believe, to finish these cases, and that's to start the
25 clock. We've set a -- asked for a disclosure statement

1 hearing for May 16th. We think that by starting the clock
2 and working with the stakeholders and really driving the
3 process leading from the front and getting people to focus
4 on what's really necessary in order to wind up the estates,
5 that's the only way it's going to happen.

6 But this is after, you know, roughly serving out
7 60 days ago the first draft of a plan. You know, I think
8 some claimants would say let's please wait. And you know,
9 our view, our strong view here is that if you don't have
10 deadlines associated with the plan process, gravity will
11 take over. And it's very difficult to get the estates
12 efficiently wound up.

13 There's still a significant amount of work. Even
14 though the assets are largely gone associated with the
15 ongoing operations, there's very significant services that
16 are still being provided by the estate, including transition
17 services, issues related to executory contracts, cure
18 reconciliation.

19 And I wish I could tell Your Honor that it's just,
20 you know, it's a one-person job at Weil and Akin to, you
21 know, go through all of those claims, but it's not. It's
22 literally, you know, hundreds of inquiries every day and
23 trying to work through the employee issues, the regulatory
24 issues, the bank issues. There's still quite a bit that's
25 going on, so those transition services are ongoing, and you

1 know, we know that we have to wrap things up.

2 The plan overall, it's a non-consolidated plan.
3 It's a straight, what I call waterfall plan, with only one
4 settlement at this time incorporated, which is with the
5 PGBC. The plan has a mechanic that's under discussion for
6 resolving inter-company claims, which remains open. So like
7 any company, Sears did not have cash at every legal entity
8 within the structure.

9 Some entities have cash, some entities don't, some
10 have -- we know more assets, some have less, and that's very
11 common in our experience in any complex structure. So to
12 deal with this issue, we have a non-consolidated plan and an
13 ability for one Debtor to make loans to another Debtor, if
14 they believe there are sufficient recoveries to deal with
15 it.

16 We're also in discussions with certain Creditors
17 around, is there a compromise around inter-company claims
18 that everybody can get behind. As you might imagine, that's
19 a very -- it's a very complex negotiation, but we do think
20 we have at least one mechanic to preserve the integrity of a
21 non-consolidated plan.

22 The 503(b)(9) claims bar date has passed. We
23 expect to complete the initial reconciliation of claims in
24 the next few days and we'll sit down with the Unsecured
25 Creditor's Committee and professionals to review them. I

1 think the good news is that based upon our preliminary
2 review, that we think valid claims are coming in right
3 around the range that we have previously disclosed to
4 parties in interest in the Court and in line with the
5 Debtor's expectations.

6 We do have, of course, the Transform Co
7 assumption, or not assumption, reimbursement of
8 approximately \$140 million of those claims, which Mr.
9 O'Neill likes to remind me would be subject to offset, if
10 there are any costs that would be going the other direction.

11 507(b) claims, which parties in, you know, some
12 parties that are surveyed are very significant numbers are
13 just treated as a straight waterfall under the plan. We do
14 not have a global settlement with 507(b) claimants at this
15 time. We've had initial discussions with Cyrus, which I
16 would characterize as hopeful and somewhat productive.

17 I wouldn't say that they were vigorous at this
18 point. But our focus was to sit down with the UCC, get to a
19 deal -- try and get to a deal. We didn't reach a deal yet.
20 But at least file it and use the filing of the plan as a
21 mechanic to sit down with the large 507(b) claimants in
22 these cases, in the very near future.

23 So in that vein, our plan is to sit down in the
24 next week with the key stakeholders, including Cyrus,
25 Wilmington, ESL, so that we can address how some of those

1 507(b) claims can be teed up with the Court. I've had some
2 initial discussions with ESL's counsel just around, you
3 know, if it's an estimation proceeding or the right, at
4 least procedural mechanic to get those in front of the Court
5 in conjunction with a plan process as well as a reserve
6 mechanic.

7 But we believe firmly that the structure in place
8 and the tension of a disclosure statement here and a
9 confirmation hearing, that we're going to be able to lead
10 parties to get to something that's workable to wind up the
11 affairs of the estate. We have to wind this up some way,
12 and we believe this is the best way to do it.

13 There's a litigation or a post-consummation trust
14 that I referred to earlier that's in the plan. That was
15 after a great deal of coordination among the tax
16 professionals at Akin and Weil that we believe that that's
17 the right structure for claim holders and beneficial
18 interest holders in the trust.

19 We've left the governance of the trust open as
20 TBD. That's subject to ongoing negotiations with
21 stakeholders, including the 507(b) claimants in the UCC.
22 We've left the position of the litigation trustee open at
23 this time. It's still being subject to negotiation. You
24 know, we just also wanted to mention the administrative
25 claims bar date.

1 We do have that concept in the plan. When the
2 particular date is is still subject to discussion. We've
3 dealt with this issue in two ways in prior cases, including
4 cases in front of this Court, where we've had the admin
5 claims bar date, you know, at confirmation or even sometimes
6 in advance of confirmation. We've heard from stakeholders
7 arguing each way, but we'll certainly resolve that over the
8 next couple of weeks.

9 And then, finally, on releases. There's a
10 mechanic in the plan that provides that if a party's named
11 in a plan supplement document or otherwise in a complaint,
12 they will not be released. The releases under -- are under
13 the exclusive authority within the Debtors of the
14 restructuring subcommittee, consistent with their mandate.
15 Those issues are still being under discussion, but that's
16 the mechanic that's in there right now.

17 THE COURT: And you're referring to releases by
18 the Debtor's estate?

19 MR. SCHROCK: Yes, thank you, Judge. Yes, just
20 Debtor releases. There is not non-consensual -- there are
21 no non-consensual third party releases in the plan.

22 THE COURT: Okay.

23 MR. SCHROCK: And then finally, Your Honor, just
24 as I referred to earlier, there's, you know, related to the
25 other work that's ongoing at the estate, there's quite a few

1 disputes that we're still working through with Transform Co.

2 Some of those are up today.

3 We are providing, you know, pretty extensive
4 transition services at this point, and we still have all of
5 the employees that are still employed effectively by the
6 Debtors and are being leased to Transform Co. So we have
7 numerous deals that have to be worked out with Creditors and
8 Transform Co to allow those parties to have a fresh start
9 with new Sears, and as well, still balance the estate
10 interests that we're not compromising the claims that have
11 been reserved for the benefit of the estate, namely the
12 preferences and the other litigation issues.

13 But the work is time intensive. We are very
14 mindful of the costs in this case, and we are going to do
15 our level best to try and get these estates through a
16 confirmed plan process by July. And we have, you know,
17 tentatively talked with parties about, you know, a date for
18 confirmation around the third week in July.

19 So we don't have broad support for the plan at
20 this time, but we believe the getting in on file and driving
21 the process is the right answer for these estates. And
22 then, finally Your Honor, I know that the parties made
23 notice we did -- the restructuring subcommittee did file a
24 complaint last -- late last evening against a number of
25 parties. I'm sure there'll be plenty of time for discussion

1 on those issues at another point. But you know, that action
2 is in fact under way.

3 THE COURT: Okay. Does anyone have anything to
4 say on that report? Okay. Well, obviously, the Debtors and
5 their professionals have the task of moving the case along
6 as promptly and efficiently as possible. I appreciate there
7 are a number of steps that need to be taken before you're
8 nearly at the point to confirm a plan, but it clearly to me
9 makes sense to be moving forward as you are within active
10 consultation with the key parties in interest.

11 It's in their interest, too, except perhaps,
12 although I think it's in their interest also, parties that
13 may view themselves more as litigation targets than
14 Creditors. But frankly, I think resolving the cases
15 promptly is in everyone's interest.

16 And in that regard, I only have a couple of
17 observations. The first is that if the cost of doing your
18 company analysis or the difficulty of it exceeds the
19 benefit, you know, there is an alternative, which is
20 substantive consolidation, so that's something to be aware
21 of.

22 MR. SCHROCK: Yes, Your Honor. We're
23 (indiscernible) aware of that and --

24 THE COURT: Okay.

25 MR. SCHROCK: -- I think we're hopeful that

1 reasonable minds will agree on something.

2 THE COURT: Well, and it's a factual
3 (indiscernible), if you can actually make the analysis, then
4 ignore what I just said. Secondly, as far as the necessary
5 reconciliation of claims is concerned necessary for
6 confirming a plan that is, you're absolutely right. They're
7 under the authority to estimate claims.

8 And given the actual outcome of the sale and the
9 related GOB sales, that should be a much easier process. So
10 again, it's not something that I think parties should spend
11 a lot of time and money on trying to negotiate, if there's
12 just an impasse. I think you may just want to tee up an
13 estimation on that (indiscernible) --

14 MR. SCHROCK: That's -- that was our thinking
15 exactly, Your Honor.

16 THE COURT: Okay. I mean, unlike when it was
17 being discussed during the sale hearing, when I was asked to
18 compare alternatives as far as 507(b) claims are concerned,
19 we don't have an alternative scenario here. We actually
20 have the facts, so I think it's a lot easier to decide at
21 this point.

22 MR. SCHROCK: Thanks very much.

23 THE COURT: Okay. So why don't we proceed then
24 with the agenda?

25 MR. SCHROCK: Yes, Your Honor. The first item on

1 the agenda is the Debtor's motion to enforce the asset
2 purchase agreement automatic stay against Transform Holdco,
3 and I'll cede the podium to my partner, Mr. Friedmann.

4 THE COURT: Okay.

5 MR. FRIEDMANN: Good morning, Your Honor, Jared
6 Friedmann from Weil, Gotshal on behalf of the Debtors.
7 Before I get into the credit card accounts receivable issue
8 we were discussing at the last hearing, I wanted to put on
9 the record where we are with respect to the interim
10 agreement we advised you of at the last hearing regarding
11 the two other categories of assets that we've moved on in
12 our motion to enforce the automatic stay.

13 THE COURT: Okay.

14 MR. FRIEDMANN: As we advised you then, the basis
15 of that agreement was that there were initial payments that
16 were to be made to Debtors on March 26th. And then, we gave
17 Transform until April 3rd to complete the reconciliation
18 process and pay us whatever the remainder was of the
19 undisputed amounts.

20 So with respect to the cash in transit, and those
21 are the pre-closing proceeds that ended up in Transform,
22 because we had transferred the cash management system over
23 to Transform at closing, so these were pre-closing proceeds
24 that ended up in the bank accounts they were intended for,
25 but those bank accounts were no longer in our possession so

1 they went over to Transform and we were moving to get them
2 back.

3 So on March 26th, consistent with our agreement,
4 the Debtors were paid \$3 million and they were produced
5 documentation regarding the reconciliation at that point.
6 On April 3rd, pursuant to the agreement, Transform was
7 supposed to pay Debtors any amount above and beyond that \$3
8 million initial payment and to also provide us with
9 additional reconciliation.

10 On April 4th, Transform confirmed that the total
11 amount of cash in transit in the cash management system was
12 \$22.5 million, so \$19 and a half million more than they had
13 paid us on March 26th. There is no dispute regarding that
14 \$22.5 million number. To date, however, Transform has
15 refused to turn over that \$19 and a half million delta in
16 cash in transit proceeds. And again, these are dollars that
17 we would have had in our bank accounts, had we not given
18 them our bank accounts.

19 THE COURT: And what's the standard rationale for
20 not paying it?

21 MR. FRIEDMANN: The standard rationale, as we
22 understand it, and this is for both the cash in transit as
23 well as the (indiscernible), which I'll discuss in a moment,
24 is, as we understand it, that there are other set-offs. And
25 in our discussions, we've reminded Transform of Your Honor's

1 admission at the last hearing that set off our -- an excuse
2 and they still violate the automatic stay. It hasn't worked
3 yet so far.

4 So as -- we're willing to give Transform until
5 next Thursday to turn over these funds to us, otherwise, we
6 anticipate moving on an expedited basis to have another
7 hearing because we need these dollars now.

8 THE COURT: And has Transform identified to you
9 what the basis for the claims over are?

10 MR. FRIEDMANN: There are a series of various
11 setoffs and reconciliations that necessarily are happening
12 between the companies and we're happy to work through those.
13 Our point with respect to both the cash in transit and the
14 rent (indiscernible), these are announced at our estate
15 property and were supposed to be turned over to us
16 immediately.

17 No doubt there would be later reconciliations on a
18 number of other issues, which we're happy to work through
19 with them, but these are -- this is estate property that
20 they're holding onto and not turning over on the rent
21 (indiscernible) and the APA --

22 THE COURT: Can I interrupt you?

23 MR. FRIEDMANN: Please.

24 THE COURT: I understand reconciliations. That
25 presumes that departure's still trying to work out what is

1 owing. But I'm trying to understand whether Trans Co has
2 asserted that there are actually separate and apart from
3 just trying to figure out the ultimate purchase price,
4 whether there amounts owing by the Debtors to it, that would
5 be the set off. The rest is a reconciliation of amounts
6 that are to be paid and still to be decided to be paid, in
7 other words.

8 MR. FRIEDMANN: Yeah, so it's a series of other
9 set offs, and there are other buckets where monies are owed
10 from Debtors to Transform Co.

11 THE COURT: Okay.

12 MR. FRIEDMANN: And so, they're using those other
13 buckets to offset the cash in transit and the real estate
14 (indiscernible), as we understand it at this point.

15 THE COURT: Are those owed under the purchase
16 agreement? It's asserted as being owed under the purchase
17 agreement? I don't understand. They're the buyer. Why
18 would the Debtor be owing them money except as part of
19 reconciling the ultimate purchase price?

20 MR. FRIEDMANN: Yeah, so that's exactly what --
21 it's reconciling (indiscernible) --

22 THE COURT: Well, but that's reconciling amounts
23 that were made to be paid as opposed to amounts that are
24 already owing.

25 MR. FRIEDMANN: Correct.

1 THE COURT: I think that's the important
2 distinction. So I just reiterated what I said last time. I
3 don't see any basis not to pay this money, unless you know,
4 they disagree and say that the Debtors independently owe
5 Trans Co something, as opposed to Trans Co has the right
6 under the purchase agreement to adjust remaining amounts,
7 not these amounts, but other amounts that are still to be
8 fixed.

9 MR. FRIEDMANN: The -- just to be on the record
10 also, respectfully, the rent -- the February rent
11 (indiscernible), they are too consistent with the agreement
12 on March 26th, Transform paid Debtors \$5 million and
13 produced documentation at that time, calculating where --
14 how they've gotten there so far.

15 On April 3rd, they were supposed to pay any
16 amounts over that \$5 million owed in rent (indiscernible),
17 and provided Debtors with backup. On April 4th, Transform
18 advised and it confirmed that \$14.9 million in rent
19 (indiscernible) was due. They were still reconciling
20 apparently another \$1.3 million of that.

21 Now while we believe that the \$1.3 million is also
22 due and owing to the Debtors, the \$9.9 million delta between
23 the \$5 million they gave us on March 26th and what they had
24 already determined was owed by April 4th has also not been
25 paid. So in total, there is the \$19.5 million in cash in

1 transit, plus the \$9.9 million in rent (indiscernible).

2 So \$29.4 million in total that we believe is
3 estate property that should be turned over immediately, and
4 as I said, it is -- we've -- you know, we're happy to wait
5 until next Thursday for them to do what needs to be done to
6 get that money to us, but if we do not receive that money by
7 next Thursday, we do anticipate moving the Court on an
8 expedited basis.

9 THE COURT: Okay.

10 MR. FRIEDMANN: And the turn now to the credit
11 card receivables account issue. So as I -- a preliminary
12 matter, I just wanted to move into evidence the second
13 supplemental declaration of (indiscernible) in support of
14 the motion to enforce, which is Document 3080.

15 THE COURT: Okay. As I understood it, the parties
16 were not going to be treating this as a hearing with live
17 testimony. Is that correct?

18 MR. FRIEDMANN: I believe from my discussions with
19 my colleagues at Cleary that neither of us intend to call
20 any witnesses today.

21 THE COURT: Okay, all right, so if there's no
22 objection to the admission of that declaration, subject to
23 sometime in the future if need be, you have the right to
24 examine the witness on anything other than just the
25 documents that were provided. Okay, I'll admit it, then.

1 (Document 3080 Admitted Into Evidence)

2 MR. FRIEDMANN: So Your Honor, the Court asked the
3 party to submit a supplemental briefing addressing whether
4 the credit card processing agreements filed by the buyer on
5 the eve of the March 21st hearing helped clarify in any way
6 whether or not the reserve accounts at issue fall within the
7 APA's definition of credit card accounts receivable.

8 THE COURT: Right. And I also wanted to make sure
9 I had all of those agreements, which I believe I do now, I
10 have.

11 MR. FRIEDMANN: They would know better than we do,
12 and we're assuming that they've pre-solved them.

13 THE COURT: Okay.

14 MR. FRIEDMANN: And frankly, I'm not sure it
15 matters that much because from the agreements that we've
16 seen, those agreements demonstrate or at least do nothing to
17 refute that the reserve accounts do in fact fall within the
18 definition of credit card accounts receivable.

19 The buyer's initial brief and then their
20 subsequent reply brief repeat the same argument over and
21 over again, and because the reserve accounts describe their
22 treated something and as they -- a security in the
23 processing agreements, that therefore, those reserve
24 accounts must also be a security deposit and cannot be
25 credit card accounts receivable within the meaning of the

1 APA.

2 And that argument, we submit, is fundamentally
3 flawed. The fact that the reserve accounts are described or
4 treated as security under the processing agreements does not
5 mean that they'd be -- necessarily become security deposits
6 within the meaning of the APA. All that matters here is how
7 the Debtor and the buyer define credit card accounts
8 receivable in the APA, and whether the reserve accounts fall
9 within that definition, which they plainly do. Likewise --

10 THE COURT: That's because the operative paragraph
11 is Paragraph 10?

12 MR. FRIEDMANN: I think the operative paragraph is
13 the definition of credit card accounts receivable, which is
14 --

15 THE COURT: Well, I understand, but --

16 MR. FRIEDMANN: Right. And then 10.9.

17 THE COURT: It flows through Paragraph 10 because
18 that's the mechanism where credit cards accounts receivable
19 comes into play.

20 MR. FRIEDMANN: That's correct, Your Honor. But -
21 -

22 THE COURT: Okay.

23 MR. FRIEDMANN: -- and credit card -- it includes
24 the defined term credit card accounts receivable, which
25 requires you to go back to the definition.

1 THE COURT: Right.

2 MR. FRIEDMANN: Like, the fact that the reserve
3 account serve a security under a collateral to protect the
4 processors from default doesn't change the fact that the
5 reserve accounts are ultimately due and payable to Sears, a
6 fact that the buyer does not and cannot really dispute. In
7 fact, in their initial moving brief, they cite the American
8 Express amended agreement in Section 2, which explains that
9 although American Express was not currently obligated to pay
10 Sears anything in their reserve accounts, it ultimately is
11 obligated to return an amount equal to the amount in the
12 reserve, not of any current obligations. So at all times,
13 that money is due and owing to Sears, there just may not be
14 a payment obligation right away.

15 The buyer also argues in their reply brief that
16 the terms in the (indiscernible) related agreement should be
17 given the same meaning. But of course, the APA and the
18 processing agreements are not in the same, nor are they even
19 related agreements. In all the cases the buyer sites for
20 that proposition are at opposite because they concern
21 provisions that are in the same agreement or transactions
22 that were intertwined or multiple contracts in a single
23 transaction, so none of that case law is applicable here.

24 Similarly, the buyer's argument in their reply
25 that the processing agreements are integrated into the APA,

1 (indiscernible) by the integration clause at 13.4 in the
2 APA. The buyer also argues that the processing agreements
3 were the backdrop against which the APA was drafted.

4 Accepting that premise as true for a moment, Your
5 Honor, it's notable that not only are the reserve accounts
6 not carved out from the APA's definition of credit card
7 accounts receivable, but Section 2.10, which lists almost
8 every conceivable type of security from restricted cash to
9 letters of credit to utility deposits and everything in
10 between, what doesn't it include, are reserve accounts held
11 by the credit card companies.

12 Why is that? It's because they're already covered
13 and included within the broad definition of credit card
14 accounts receivable. And Your Honor, as we discussed in the
15 last hearing, even if the reserve accounts are a type of
16 restricted cash or other security or whatever buyer is
17 arguing today about where it falls under 2.1, the APA's
18 specific definition of credit card accounts receivable
19 controls over that broad catch-all provision in 2.10 or even
20 2.1 (indiscernible).

21 And as I mentioned early -- earlier, what really
22 matters is how the APA defines credit card accounts
23 receivable and whether the reserve accounts are in fact
24 credit card accounts receivable within the meaning of the
25 APA. And we submit that they are.

1 The APA defines credit card accounts receivable as
2 each account together with its proceed is owed by the credit
3 card payment processor to a seller, resulting from charges
4 by a customer of a seller on credit cards that are processed
5 by such a processor in connection with the sale of goods by
6 a seller or services performed by a seller, in each case in
7 ordinary course of that seller's business.

8 And unless you twist the words of the definition
9 of credit card accounts receivable, these reserve accounts
10 satisfy every element of that definition. The fact that as
11 we've (indiscernible) recently First Data has agreed to
12 release \$15 million of the \$28 million that its holding in
13 reserve accounts underscores our point that the reserve
14 accounts are in fact owed, and that they're far more liquid
15 than the buyer tried to portray.

16 Mr. Kamalani's latest declaration submitted with
17 the reply brief candidly admits in Paragraph 5 that the
18 reason First Data did not release the reserve accounts pre-
19 closing to Sears is that ESL refused to provide the
20 information that was requested. He then goes on to explain
21 in the next paragraph that after the closing, when Transform
22 did provide that information, First Data is not prepared to
23 release \$15 million.

24 So I want to stop there for a moment, because what
25 it demonstrates is that that money, at the time of closing,

1 was available to be released. It was owed, it was ready to
2 be released. All that had to happen was for ESL to provide
3 the information that First Data was requesting, and then \$15
4 million at that moment would have gone straight to debtors
5 and be in their pockets right now. We wouldn't be having
6 this issue.

7 But what ESL did was to say, "We refuse to give
8 you the information right now." As Mr. Kamalani says in his
9 declaration, they waited until after the closing and then
10 they went and gave that information, and now the \$15 million
11 is available.

12 There also can be no dispute that had, following
13 the sale hearing, the deal for some reason fallen apart and
14 that there was no deal with ESL, and Sears had to go through
15 a liquidation, the amount in those reserve accounts would
16 have gone right to the debtors.

17 The agreements would have been done and saved for
18 any chargebacks, but you go into a going out of business
19 deal, there are no returns. There aren't even any
20 chargebacks. There's a lot of money flowing in. The
21 reserves clearly would have gone to debtors because that
22 money was always owed to debtors.

23 THE COURT: Well, can I -- I want to make sure I
24 understand what you all are really fighting over,
25 practically. 10.9 of the APA is the provision that sets

1 forth an aggregate amount of inventory value, amounts due to
2 seller with respect to credit card accounts receivable, and
3 pharmacy receivables, and says that it should be at least
4 \$1,657,000,000.

5 And then it says that to the extent that that
6 amount -- the amount of those three items exceeds,
7 \$1,657,000,000, sellers may reduce such amount to be equal
8 to that number by first transferring inventory and second
9 retaining as an excluded asset, the oldest of any credit
10 cards account receivable.

11 So that's a mechanism that comes into place that
12 refers just to credit card accounts receivable, right? It
13 doesn't have anything to deal with security deposits.

14 MR. FRIEDMANN: That's correct.

15 THE COURT: One can conclude, therefore I think,
16 that if something is both a credit card account receivable
17 and a security deposit, that paragraph would operate just
18 fine. It doesn't matter whether a security deposit, you
19 just use the paragraph because it all refers to accounts
20 receivable.

21 MR. FRIEDMANN: That's correct, Your Honor.

22 THE COURT: Okay. Is there some other provision
23 of the agreement that applies to require the security
24 deposits to be held? In other words, are you saying that
25 you're entitled, the debtors are entitled to other money

1 constituting credit card accounts receivable because it's
2 not a security deposit? Or are we just arguing about the
3 operation of 10.9?

4 MR. FRIEDMANN: What we're arguing about is the
5 operation of 10.9, and I think the key factor here is
6 whether or not those reserve accounts were considered part
7 of the credit card receivables to get to the threshold.

8 THE COURT: I understand that. But in your
9 explanation about they should pay us the \$15 million now, I
10 wanted to make sure I understood your basis for saying that.

11 MR. FRIEDMANN: Let me reclarify also that point,
12 is that we do not dispute that what 10.9 entitles us to is
13 the oldest of any credit card accounts receivable.

14 THE COURT: Okay.

15 MR. FRIEDMANN: So if Your Honor was to order than
16 what we're entitled to is \$14.6 million of the oldest credit
17 card receivables, and that First Data should release \$14.6
18 million of only the oldest credit card receivables to us, we
19 have no issue with that.

20 THE COURT: Okay. So you're not arguing then that
21 Transform is obligated to release all of the reserve amounts
22 because they're credit card accounts receivable. You're not
23 arguing that.

24 MR. FRIEDMANN: No, and there's a suggestion in
25 their brief that we're suggesting that the reserve accounts

1 were not transferred or we were arguing they should not have
2 been transferred. All of the security deposits, all of the
3 accounts receivable, all of that went to Transform.

4 The point is that that in that happening, and in
5 light of the fact that there also were pre-closing
6 transactions that had not yet cleared, they ended up in
7 excess of the \$1.657 -- not only by the \$7 million that was
8 recognized at the closing which is why there was property,
9 inventory transfer, but it ended up being an additional
10 \$14.6 million, as they learned about a week a later when all
11 those credit card transactions had cleared.

12 THE COURT: Okay, all right. That's fine. I just
13 wanted to make sure I understood the extent of your claim or
14 your demand.

15 MR. FRIEDMANN: And the last point I wanted to
16 make, Your Honor, was on this point exactly, which was that
17 at the closing, Transform admitted that the debtors had met
18 and exceeded this \$1.657 billion threshold -- and that's
19 demonstrated in the emails between counsel for debtors and
20 ESL, which are attached to Mr. (indiscernible) declaration
21 that we just put into evidence. It was only hours before
22 closing the parties had agreed that debtors would be
23 delivering in excess of \$7 million above the aggregate
24 threshold in 10.9.

25 And the email shows that the parties agreed at

1 that point that at ESL's request, the debtors would take \$7
2 million in prepaid inventory that was still at the vendor's
3 facility instead of taking inventory that was already in
4 transit. And my understanding is the reason for that swap
5 was that the inventory already in transit could go towards
6 the borrowing base, whereas the prepaid inventory that was
7 still at the vendor could not.

8 So we agreed to accommodate them in order to get
9 this deal to close at that point, but -- and first of all,
10 the characterization by the way in the briefing that there
11 was some threat made that they had to do this, that's just
12 ridiculous. But it's also not the point.

13 The point is that there would be no \$7 million in
14 excess of inventory to be transferred unless the \$1.657
15 threshold was met. And that threshold is met only if the
16 reserve accounts were treated as part of the credit card
17 accounts receivable in 10.9 by both parties.

18 Your Honor, in the end, you have before you an
19 agreement whose terms are unambiguous. The definition of
20 "credit card account receivable" is enough to clearly
21 embrace the reserve accounts, even in the context of what we
22 see in the proxy agreements. At the end of the day, this is
23 about what the agreement says, not what ESL made, not which
24 they had negotiated.

25 For that reason, we ask the court to enforce the

1 automatic stay and order First Data to release, \$14.6
2 million currently held in reserves to the buyer. I'm sorry,
3 to the debtors. Thank you.

4 THE COURT: Okay.

5 MR. LIMAN: Your Honor, Lewis Liman. My
6 colleague, (indiscernible), is prepared to answer briefly
7 the questions with respect to cash in transit, if Your Honor
8 has questions about that. The bottom line is we didn't know
9 that that was on the agenda for today.

10 THE COURT: No, I just wanted to make sure I
11 understood it, because again, the issue about the automatic
12 stay is a serious one, and I wanted to make sure Transform
13 appreciates the difference between setting off a claim
14 against another claim or withholding cash based on a claim
15 setoff right, which would violate the automatic stay.

16 The difference of that concept from the concept of
17 adjusting accounts through a reconciliation process, which
18 is recoupment, which is not subject to the automatic stay.
19 And if it's the former, we should stop it.

20 MR. LIMAN: Okay. We have serious quarrels with
21 Mr. Friemdann's representations.

22 THE COURT: Okay, that's fine. We don't need to
23 get into that today. I just wanted to give everyone a
24 head's up on how I think that issue should be viewed as far
25 as the automatic stay is concerned.

1 MR. LIMAN: Your Honor, with respect to the credit
2 card accounts receivable security deposit issue, we've got
3 several points that we wanted to highlight. The first is
4 that, you're quite correct, that the operative language to
5 focus on is 10.9, which has two components as applicable
6 here. One is that it has to be credit card accounts
7 receivable, and second it has to be due.

8 Now from the beginning of this case -- and I mean
9 from the beginning of this case -- there has been a
10 distinction drawn between the notion of credit card
11 receivables payer to debtors and reserve accounts. And when
12 I say, "from the beginning of this case," I'm referring to
13 the first stay order that was entered in this case.

14 It's Docket 1394, which refers separately to the
15 credit card receivables payable to debtors, that's Paragraph
16 19, and to the reserve accounts maintained by the payment
17 processors, and that's Paragraph 15. And that is obviously
18 a backdrop against which this was drafted.

19 THE COURT: Why is that?

20 MR. LIMAN: Why is that? Because I think, Your
21 Honor, the parties recognized from the very beginning -- and
22 I'll get into the detail with respect to this -- that
23 there's a difference between the amounts that were in the
24 reserve accounts and the credit payables. Different rights
25 that the credit card processors had with respect to those

1 funds.

2 THE COURT: Well the processes, I understand that
3 issue.

4 MR. LIMAN: And that, I think, ultimately
5 underlies a lot of the issues and a lot of the dispute
6 between us. What I'd like to do -- should I ignore that?

7 THE COURT: Well, let's see if anyone answers
8 that. I think that was just a glitch with the call.

9 MR. LIMAN: I'd like to focus on three or four
10 elements of the contract. The first is the definition of
11 "credit card accounts receivable." The second is the
12 definition of "due," the third is the notion of payment. In
13 order for something to be a credit card accounts receivable,
14 there has to be at least two elements.

15 First of all, it has to be a payment intangible,
16 and second, the payment intangible has to be owed as a
17 result of card charges in the ordinary course. Now we've
18 cited a case in our papers -- I noticed Mr. Friedmann did
19 not respond to it -- that a reserve account, payments that
20 are held in a reserve account, that were withheld from
21 payments otherwise due, do not constitute a payment
22 intangible.

23 The monies in essence of Sears of debtors that are
24 held by the card companies as security. That's the
25 Morristown Lincoln case, it's not answered. The second

1 element is these need to be a payment intangible --

2 THE COURT: Well, it says "account or payment
3 intangible."

4 MR. LIMAN: That's correct, Your Honor. And the
5 definition of "account," these would be an account under the
6 UCC as between the card processing companies and the
7 ultimate customers. So I think under the UCC, these would
8 not fall within the definition of account. They -- the
9 argument would be that they fall within the definition of
10 payment intangibles, but monies that have been held back on
11 behalf as security on behalf of another party are not
12 payment intangibles.

13 THE COURT: Why isn't it an account? It's owed.
14 They're holding it back because they have a right of set
15 off, which means there's another obligation which they owe,
16 which they're holding back to set off against.

17 MR. LIMAN: It's because it's cash that is held by
18 the card processing companies in the form of cash. So that,
19 I believe, under the UCC, would make it fall within the
20 definition of payment intangible, if anything. I do want to
21 focus though on the language about owed as a result of card
22 charges in the ordinary course. And I also want to focus on
23 the language of the card agreements.

24 Now Mr. Friedmann told you, and his briefs say,
25 that you should not look at the card agreements for their

1 definitions. I'd like to cite a couple of cases to you and
2 propositions that demonstrate that that's wrong. It's the
3 restatement of contracts 214 says that when you have related
4 contracts and you're trying to interpret a term, you look to
5 those related contracts. And after all, what we're trying
6 to figure out here is whether these monies that are, that
7 are held by First Data, AmEx and Discover, in each instance
8 fall within credit card accounts receivable.

9 The other case I'd like to cite to you is the
10 Shiftan case, Delaware 57.935, Note 15. If you look, just
11 for example, and parse carefully the language of the First
12 Data agreement, that tells you what is payable from card
13 transactions in the ordinary course. The language almost
14 tracks the language that is in the APA. It refers to sales
15 data that come from card transactions in the ordinary
16 course.

17 And remember, ordinary course in the APA in this
18 instance is used in the lower case, not the formal upper
19 case, so it's got to be referring to something. Our view is
20 that it best refers to that language in First Data and in
21 the other agreements.

22 And then it tells you what is payable out of those
23 card transactions in the ordinary course. And what it tells
24 you is payable is a net amount. It's not just monies that
25 were furnished as a result of card transactions at the Sears

1 stores. The amount that is payable is an amount that is net
2 of reserve account amounts.

3 Now, the debtors would say, well the title, you
4 should disregard the title of credit card accounts
5 receivable because receivable and payable are not referred
6 to within the definition. But they also within the papers
7 say that the word "owed" equals payable. That's their
8 Paragraph 18.

9 And we would respectfully submit that in order to
10 determine what is payable, or what was receivable out of
11 card transactions in the ordinary course, you don't need to
12 go beyond the First Data agreement at Paragraph 4.3 and the
13 other related provisions.

14 Now, Mr. Friedmann also told you that reserve is
15 not mentioned within the APA, but he has no answer to the
16 fact that security is referenced within the APA. The
17 reserve is simply the account in which the asset is being
18 held. There's no -- it shouldn't be a surprise that reserve
19 is not being mentioned. The issue before Your Honor is
20 what's due and how to characterize that cash in the moment
21 of closing in the hands of the debtor.

22 And when the agreements before you refer in the
23 instance of First Data to an amount that is held for
24 protection against the risk of default, when they refer to
25 in the AmEx agreement as an amount that is collateral, when

1 they refer to in the Discover agreement as security, and in
2 the Discover agreement -- and I do have a correction I need
3 to make from my argument last time -- the Discover agreement
4 makes it quite clear that there is a security interest that
5 Discover has in these funds.

6 The correction that I have to make is that I fear
7 that I may have been misunderstood to suggest that the card
8 processing companies don't have a security interest in these
9 funds. I think they do, and I think what you need to do is
10 look at the UCC paragraphs or sections 3.12 to 3.14. It
11 says that when the funds are in the possession of the card
12 companies, that gives them a security interest without the
13 need for perfecting. I've got two more points I'd like to
14 make --

15 THE COURT: But they weren't granted a lien. They
16 have a right of setoff.

17 MR. LIMAN: They have a right of setoff. Under
18 the UCC, they've got -- they don't need to -- and right of
19 setoff actually is quite important, and I want to get back
20 to that in a moment. They don't need to have perfected
21 their filing --

22 THE COURT: No, but that's a different point.
23 That's perfection as opposed to a lien. And I think what
24 they have is a right of setoff, i.e., they owe Sears money,
25 which they have a right to offset against.

1 MR. LIMAN: That's correct, Your Honor. Now there
2 are two additional points that I want to make with respect
3 to just the definition of credit card accounts receivable.
4 The first is that when you look at the argument in the
5 definition that the debtors urge you to apply, which is to
6 say that the funds that were used to satisfy the reserve
7 obligation were generated from credit card receipts. As
8 we've pointed out, there is no limiting principle with
9 respect to that argument.

10 THE COURT: I don't understand.

11 MR. LIMAN: Well the point, Your Honor, is that in
12 each instance, Sears had an option when the card companies
13 said in order to continue to do business with us, we need
14 you to post security. Until First Data -- what First Data
15 said is you need to post a letter of credit. You've got an
16 option if you don't want to post a letter of credit to post
17 cash or to permit us to withhold. Similar mechanisms under
18 the AmEx agreement and under the Discover agreement. I
19 don't think there would be any dispute if the debtors here,
20 Sears chose pre-petition to deposit cash with the card
21 companies. That money would not constitute a credit card
22 account receivable. That money would be derived from credit
23 card transactions, and that's where Sears's money came from.
24 It's a retail business. Its revenues are all derived from
25 there.

1 THE COURT: But the parties actually use the term
2 "credit card accounts receivable." They didn't use the term
3 "cash." And that's the term that's used in 10.9.

4 MR. LIMAN: They did not --

5 THE COURT: I mean, I guess this is my ultimate
6 point. Why can't something be both a credit card account
7 receivable and a security.

8 MR. LIMAN: Your Honor, if you look at -- because
9 under 2.1D, we got the right to all of the acquired
10 receivables. And under 2.1P2, all of the security deposits,
11 free and clear.

12 THE COURT: Subject to 10.9. 10.9 doesn't take
13 those asway, it just says if the aggregate amount of the
14 three items listed in 10.9, including Item 2 of those 3, the
15 credit card accounts receivables exceeds \$1 billion, \$600
16 and some thousand, million dollars, then the debtors can
17 take from the bottom, from the oldest credit card accounts
18 receivable. It doesn't take away what the debtors sold. It
19 just says that the debtors actually sell more than the
20 billion six, they get this adjustment.

21 MR. LIMAN: There are two reasons, two other
22 reasons why they can't on these facts be both. One reason
23 is that what these funds on the facts of these agreements,
24 what these funds were doing was securing obligations of
25 Sears. And so they were not, in fact, payable to Sears.

1 There was no obligation to pay these --

2 THE COURT: It doesn't say "payable," it says
3 "owed." It says "owed by." And that's what a setoff is.
4 That's the underlying right to the -- that's the applicable
5 language in 2.10, setoff.

6 MR. LIMAN: Your Honor, I don't think there's any
7 dispute that "owed" also is a synonym for "is payable."

8 THE COURT: Then they would have used the word
9 "payable" instead of "owed." One is present, and one is
10 both present and future.

11 MR. LIMAN: But one of them is also has to be
12 derived, and this is the key language, that debt that is
13 owed has to be from the credit card transactions. It can't
14 -- in these instances, that debt is not owed as a result of
15 the credit card transactions.

16 THE COURT: Well how did -- I'm sorry, can we just
17 go through 1.1. Each account, or credit card receivable,
18 each account or payment intangible, each is defined in the
19 UCC, together with all income, payments, and proceeds
20 thereof owed, right, credit card payment processor, or an
21 issuer of credit cards to a seller, resulting from charges
22 by a customer of the seller on credit cards processed by
23 such processor or issued by such issuer in connection with
24 the sale of goods by a seller or service performed by a
25 seller in each case in the ordinary course of business.

1 So as I read the agreements, the credit card
2 processor agreements, they get the payments by the
3 purchasers, based on the processor or issuer being paid in
4 the ordinary course. And they owe that money to the debtor,
5 but they have the right to hold as a basis of setoff
6 (indiscernible).

7 So I mean, again, this agreement -- and we
8 clarified this when I was here for the debtor's counsel --
9 does not require the buyer to pay over the amount that's
10 being held, but it does, I think, require the buyer to pay
11 over effectively or not buy anything above the billion 657
12 in the form of the oldest credit card accounts receivable.

13 So it's just a business deal, that that was the
14 receivable. And it seems to me that these are credit card
15 accounts receivable -- I can't imagine that they aren't.
16 It's not -- that's the basis for the relationship. There's
17 no separate lien, it's just an offset.

18 MR. LIMAN: Your Honor, let me put it this way.
19 Let's imagine a different world in which First Data had
20 filed for bankruptcy. And First Data -- and the question
21 was what is the character of those funds that were held by
22 First Data. Remember, they're held in a separate account.
23 Only First Data gets access to those accounts. It's a
24 separate account that is funded.

25 Now in that alternative world, there will be two

1 questions. If it's an accounts receivable, then my
2 understanding is that that -- that Sears would be a general
3 unsecured creditor, just entitled to be paid on those
4 accounts receivable. I don't think that that is the
5 argument that Sears would be making in that instance.

6 What Sears would be saying -- and they would be
7 correct -- is that the money in the reserve changed
8 character once it was withheld from the accounts payable and
9 used to satisfy their obligation under the agreement. What
10 they would be saying in that instance is that they've got an
11 interest in those funds.

12 THE COURT: Who does?

13 MR. LIMAN: Sears would be saying that. And
14 there's a case that I would cite, Your Honor, with respect
15 to that very proposition. It's the Ionosphere case, 177
16 Bankruptcy 198. That's what Sears would be saying. And
17 what First Data would be saying is that by virtue of their
18 possession of those monies that belong to Sears, they've got
19 a security interest. Now, if you look at the --

20 THE COURT: No, there's no grant of a lien. They
21 would say they have a -- they would say they have a secured
22 claim because of a right of setoff, a contractual right of
23 setoff.

24 MR. LIMAN: And that would distinguish this from a
25 accounts receivable.

1 THE COURT: But the basis for the setoff is that
2 one party owes another party, and that party owes the other
3 party. They both owe each other, so it is an account.

4 MR. LIMAN: But let's take the American Express
5 Reserve for an example. American Express Reserve, those
6 funds are held --

7 THE COURT: Can I interrupt you for a second, sir?
8 The UCC definition of account means "a right to payment of a
9 monetary obligation, whether or not earned by performance."
10 And it includes, among other things, "arising out of the use
11 of a credit or charge card." So why isn't this a monetary
12 obligation arising out of the use of a charge card owed by
13 the processor, which however, the parties have agreed can be
14 held based on a right to setoff.

15 MR. LIMAN: Your Honor --

16 THE COURT: So it's an account obligation. It's
17 two mutual obligations.

18 MR. LIMAN: Your Honor, there's commentary onto
19 the UCC, and I can provide you cases. I don't have them
20 right here at the (indiscernible), but I'd be happy to
21 provide them this afternoon, that says that that language
22 from card transactions refers to the obligation between the
23 card company and the ultimate customer.

24 THE COURT: Fine, but it's a right to payment, and
25 that's what Sears has. It has a right to payment. It's not

1 earned yet. I'm sorry -- it's not payable yet, but it has a
2 right to payment.

3 MR. LIMAN: Your Honor, but let's just pass for
4 the moment the question of whether these are payment
5 intangibles or accounts.

6 THE COURT: Okay.

7 MR. LIMAN: They do need to result -- whether
8 they're accounts or payment intangibles, they're an
9 obligation. That's what unites payment intangibles and
10 accounts. They're obligations. The question that the rest
11 of the definition addresses is what is that obligation
12 derived from. It's not how is that obligation satisfied, it
13 is what is that obligation derived from.

14 THE COURT: Well, it's --

15 MR. LIMAN: That I think is the best --

16 THE COURT: All right, but I think you're arguing
17 that it is not an obligation owed by a credit card payment
18 processor resulting from charges by a customer of the seller
19 on credit cards processed by such processor.

20 MR. LIMAN: In the ordinary course.

21 THE COURT: In each course, the ordinary course.
22 But these were credit cards. The customers use them in the
23 ordinary course. The obligation was charged in the ordinary
24 course. And this agreement in each case lays out the
25 obligation of the credit card processor to pay the amounts

1 over, except there's a reserve based on a right of setoff.

2 But if it's --

3 MR. LIMAN: Your Honor --

4 THE COURT: To me, it sounds like a credit card
5 account receivable.

6 MR. LIMAN: I do want to make sure I address my
7 other two arguments. I just want to make one more point
8 with respect to this. When you look at the nature of the
9 obligation, I think it is important to look at what triggers
10 the obligation to pay. In the case of credit card accounts
11 receivable, in the ordinary course there's a period of days
12 that come, and after those periods of days, you have to pay.

13 THE COURT: Right. I think our difference here
14 really stems ultimately from your view that the word "owed"
15 means payable.

16 MR. LIMAN: I don't think so, Your Honor.

17 THE COURT: Well, I mean to say that it's an
18 obligation to pay. Clearly the credit card processor has an
19 obligation to pay eventually if it turns out that the
20 reserve is not required.

21 MR. LIMAN: That's not our position. That's not
22 our position. Our position is not that these have to be
23 immediately payable. Our position with respect to the
24 definition of credit card accounts receivable is that the
25 obligation that was triggered that gave rise to the need to

1 put those monies with the card companies has to have been
2 triggered from card transactions in the ordinary course.

3 It can't be that it was triggered by the fact that
4 in the past there were card transactions. There was a
5 lingering liability. That's the facts here. There's a
6 lingering liability. The company is in financial strain,
7 financial distress that reserve accounts --

8 THE COURT: But there's nothing in the credit card
9 agreements dealing with the company being in financial
10 distress. This is an ordinary course arrangement. They
11 always have the reserve.

12 MR. LIMAN: That's not true, Your Honor. That's
13 not true.

14 THE COURT: Well the agreements don't speak about
15 financial distress.

16 MR. LIMAN: They do. If you look at 4.7 of the
17 First Data agreement. I want to be careful about using the
18 precise language because it's confidential. But you will
19 see that there's a trigger there that refers to the
20 revolving credit facility.

21 THE COURT: But is there anything in the record to
22 suggest that this money was withheld on that basis as
23 opposed to on the basis of all the other language that lets
24 them create a reserve because of a concern about --

25 MR. LIMAN: Yes, Your Honor. I'm glad you asked

1 that question. If you were to look at the Rolacheck
2 affidavit, Exhibit B, it tells you why that reserve account
3 was triggered.

4 THE COURT: Well, I'm sorry -- when you say
5 triggered --

6 MR. LIMAN: Why the obligation was created to put
7 funds in that reserve. It's not the point within 4.4, which
8 is what the debtors had cited to you. The provision that
9 First Data invokes, Section 4.7. And the only triggering
10 condition under 4.7 is the provision with respect to the
11 revolving credit facility.

12 THE COURT: Okay.

13 MR. LIMAN: And Your Honor, I would understand
14 your argument if the card companies invoked separate
15 provisions that exist under each of the agreements for
16 delayed accounts payable. They did not trigger to invoke
17 those here. Let me just address briefly two other, we
18 think, dispositive points that I don't think are answered.
19 And that I think there's been some confusion about.

20 THE COURT: Okay.

21 MR. LIMAN: The first is with respect to whether
22 these counts against the 10.9 (indiscernible). And if you
23 read that provision carefully as it was written, it has two
24 elements. One is that it has to be credit card accounts
25 receivable, and the second is due to sellers. That's the

1 language of 10.9.

2 Now my colleague would have you either say that
3 due to seller means immediately payable and would caricature
4 our argument. And again, that is not our argument. Or they
5 would say that that language is just surplusage and means
6 the same thing as owed, and that's contrary to principles of
7 contract interpretation. It's also contrary to the purpose
8 of the provision and contrary to the APA itself.

9 And I'd like to cite a couple of things to Your
10 Honor. The first in terms of how that language of due is
11 used in the APA, the drafters were quite careful to draw
12 distinctions between things that would be due or would
13 become due. You can look at the definition of "liability"
14 under the APA.

15 You can also look at 2.3K little 1, which talks
16 about obligations that transforms obligation to pay
17 liabilities as they become due in the ordinary course. If
18 there was an intent here to pick up things that would become
19 due in the ordinary course, that could be -- it could be
20 drafted that way.

21 So there could be an obligation that can become
22 payable in the future that is not currently due. And for
23 that -- and the definition that the case law gives to that
24 is to say that you have an amount is due when there is a
25 fixed, settled obligation. It's in re: Hamilton Krieg, 143

1 F3rd, 1381; in re: Rubina Metro, 522 Bankruptcy 656; and
2 Black's Law Dictionary of "due."

3 And Your Honor, I think that language is
4 critically important. First, it corresponds to what is inf
5 act payable under the card agreements. In each of the
6 instances of card agreements, it refers to two separate
7 potential sums of money. One is the sums of money that are
8 payable on the regular schedule three days, four days, five
9 days after the sales data is submitted. There's no question
10 here that those would be credit card accounts receivable,
11 that even if they were not immediately payable, would count
12 against the 10.9 cap.

13 There is the separate provision -- and here Mr.
14 Friedmann, I think, made some critical concessions that are
15 the sums that are held in the reserve accounts. Those
16 numbers first of all, you heard him say, we don't know what
17 they are. They're going to be the amount that's in the
18 reserve less what the obligations are from chargebacks.

19 And if you look at the agreements themselves, in
20 terms of when if ever they would become payable or there
21 would be an immediately enforceable right, is entirely
22 unclear. What is clear is that there was no immediately
23 enforceable right at the time of the closing to the return
24 of those monies.

25 In each instance, it had to be that there was

1 trigger conditions that were satisfied that had not been
2 satisfied, and as to which there was no date certain. Now,
3 they misquoted Mr. Kamalani from his declaration. We've got
4 the declaration in front of you. I'm not going to just
5 repeat that. I do want to address --

6 THE COURT: Well how did they misquote him?

7 MR. LIMAN: They misquote him by saying that those
8 monies would have been -- if we had only delivered
9 Transform's financial condition and information about what
10 Transform's condition would look like post closing, then
11 First Data would have released all of the reserves,
12 including the oldest of the reserves.

13 If you look at the letter from First Data and the
14 email that they quote, that's not what First Data says. And
15 if you look at Mr. Kamalani's declaration, even today after
16 we've provided that information, it's not the position that
17 First Data and the others have taken. Their position is
18 that they still have the right to a reserve, and we have no
19 entitlement to get any of that money back.

20 They're willing to put some, not released to us,
21 in reserve. But they're not resisting the notion that we
22 have a current entitlement to it. That's -- now, I don't
23 think that that is particularly here or there with respect
24 to what the communications were. We plainly didn't have an
25 obligation to turn over business information to First Data.

1 First Data still has not agreed to the turnover. I do think
2 that there's one other -- two other critical points.

3 THE COURT: Did they assign the First Data
4 agreements to transform?

5 MR. LIMAN: The debtors did assign the First Data
6 agreements to Transform, pursuant to the APA, the moment
7 that the transaction closed, those agreements were assigned
8 to us and we've exercised the right to assume those. And
9 those agreements have been assumed (indiscernible), with all
10 of the duties and rights that go with them.

11 And they were at the time the transaction closed,
12 we were delivered a schedule. That schedule had listed on
13 them the reserves. We believe that the reserves were being
14 delivered to us. There was no effort made to hold back on
15 any of the reserves. And that's what happened at the moment
16 of closing. There was a dispute over the \$7 million.

17 You've seen the different parties' views with
18 respect to that. Our view that we were threatened. They
19 say that they've got a different view. We think our facts
20 would be right. The point is that the moment that an
21 agreement was reached with respect to that \$7 million, we
22 thought they had every expectation to believe that those
23 contracts with each of the card companies were our contracts
24 that were assigned to us. And when we assume them, we had
25 the right to assume them.

1 From the card companies' perspective, which I
2 think is also recorded, to look at from this perspective,
3 the card companies also had the right to assume that when
4 they decided not to object to the APA because there were
5 reserves there, that those reserves would be kept in place.

6 Mr. Friedmann has said that all you have to do is
7 order First Data to release the reserves. I don't think
8 that that is what First Data had in mind at the time of the
9 sale hearing, and I don't think that that's what the APA has
10 in mind.

11 THE COURT: Well, First Data hasn't taken a
12 position here though, right?

13 MR. LIMAN: I think this is the first time that
14 we've heard the debtors say that Your Honor should enter an
15 order requiring them to turn over the reserves. They've
16 been very unclear about exactly the type of relief that
17 they're seeking. In our mind, the only relief --

18 THE COURT: Well they -- okay, there's this
19 dispute as to whether they're prepared to turn them over.

20 MR. LIMAN: I don't think there's even a dispute
21 as to whether they're prepared to release them.

22 THE COURT: Well ultimately, the purpose of the
23 reserve is to protect them against returns and chargebacks.
24 Once they figure out that there aren't any returns or
25 chargebacks, there's no reason to hold it.

1 MR. LIMAN: Well Your Honor, imagine the
2 hypothetical that you would have to engage in to figure out
3 what the true amount of that -- those receivables looked
4 like at the time of closing.

5 THE COURT: I'm sure they have records to show
6 that. They processed the cards.

7 MR. LIMAN: I don't think so, Your Honor, because
8 you'd have to figure out which chargebacks are associated
9 with which transactions, going back in time to figure out --

10 THE COURT: But that's what you do.

11 MR. LIMAN: No, no, Your Honor. You don't always
12 link it to a particular transaction in order to figure it --
13 to do the tracing exercise. This money exists to satisfy
14 the chargebacks, whether those chargebacks are pre-closing
15 chargebacks, which are their liabilities, or chargebacks as
16 a result of post-transactions, which --

17 THE COURT: Right, but you can tell which is
18 which. You could tell what's pre and what's post.

19 MR. LIMAN: I don't know that you can in order to
20 figure out what the --

21 THE COURT: Well then, they're not really doing
22 their job, because they have to keep records and they have
23 to know what they're doing. I guess it's conceivable they
24 don't know, but then I don't know how they file proofs of
25 claim and assert rights to collect.

1 MR. LIMAN: They've got that reserved, but in any
2 event, the number's not going to be the \$14 million or
3 whatever. It's going to be a number net of the chargebacks
4 that would be associated with card transactions up until the
5 moment of sale. And that I think is a reason why this is
6 fairly considered to be a contingent claim and not a sum
7 that is due knowing.

8 I do want to mention the notion that these have to
9 be -- that they have to have taken an action to retain the
10 cards, to come back to us of February 22nd and say the
11 reserves belong to us. I think it's just not the notion
12 that is contemplated by the APA. They say, well it's estate
13 property, so it will --

14 THE COURT: But this is not, again, I think we
15 clarified this -- the debtors are not saying that the
16 reserve account needs to be turned over. This is a
17 crediting mechanism under 10.9 of the APA. The reserve
18 stays where it is. It gets out as it gets worked out. But
19 the crediting mechanism is the only thing that this relates
20 to, under 10.9.

21 MR. LIMAN: Your Honor, if I understand the point
22 correctly, we would agree that the most that the creditors -
23 - sorry, the debtors would get is that if First Data, which
24 has the oldest of the reserves, agrees to release those
25 oldest of the reserves to us, then we have an obligation to

1 turn them over.

2 THE COURT: No, that's not what that -- I don't
3 think -- I mean, that's what I spent a few minutes with the
4 debtor's counsel on. 10.9 says that the amount over \$1.657
5 billion goes to the debtor in the form of the two abilities
6 of the debtor to use the assets. And one of them is the
7 oldest credit card accounts receivables. Not reserve, but
8 the receivables, the oldest ones.

9 MR. LIMAN: They get the right to retain --

10 THE COURT: So you all pay it over, because you've
11 gotten them.

12 MR. LIMAN: No, we haven't gotten them. We don't
13 have them.

14 THE COURT: But it's over -- it doesn't matter
15 whether you've gotten them or not. If the defined term is
16 over \$1.657 billion, then there's this purchase price
17 adjustment.

18 MR. LIMAN: But no, that's not the -- the most
19 that they would get -- assume that these were 360-day-old
20 receivables, right? They're 360-day-old receivables. When
21 we -- a year after the closing, we get paid those -- some
22 portion of those receivables.

23 THE COURT: Right.

24 MR. LIMAN: Maybe we don't get paid any of them.

25 THE COURT: I agree with that. That's what

1 they're entitled to, which explains why this isn't such a
2 big deal as far as transforms credit and everything else,
3 because the reserve is still there. They negotiated a
4 pretty good deal in 10.9 for themselves, which is that the
5 amount above \$1.657 billion, the debtor is entitled to, but
6 it gets it in the two limited ways that that section
7 provides, which are first, transferring inventory that would
8 otherwise be acquired inventory, to a GLB-leased store or a
9 GLB-owned story.

10 And second, retaining as an excluded asset the
11 oldest of any credit card accounts receivable, which you can
12 do as a book adjustment as part of the reconciliation
13 process of the purchase price. So it's not depriving
14 Transform of some sort of its benefit of this security
15 deposit. It's a purchase price adjustment where the
16 purchase price adjustment comes in those two forms in that
17 order.

18 MR. LIMAN: If I understand Your Honor correctly,
19 the inventory's all resolved, and that with respect to the
20 security deposit, it would be an obligation running from us
21 to them once that security deposit is -- those funds are
22 released.

23 THE COURT: No, it's just -- you just credit back
24 to them the amount on the oldest credit card accounts
25 receivable.

1 MR. LIMAN: Once we receive it.

2 THE COURT: No, as part of the purchase price.

3 MR. LIMAN: But it's not -- that's cash out to us.

4 And that's exactly what this was designed not to do.

5 THE COURT: Well, then --

6 MR. LIMAN: I mean, they get the --

7 THE COURT: No one has briefed that issue. But
8 that seems to be the only right that they have is to get
9 that provision enforced. I agree with you, it's not to turn
10 over the money in the reserve account.

11 MR. LIMAN: It's not to turn it over, and I think
12 we have briefed, and I don't think there's any dispute with
13 it, that the most that they would get is the contingent
14 right that if we recover, they recover.

15 THE COURT: Well, I think it's a purchase price
16 adjustment. I don't know how that's made, but that's a
17 separate issue.

18 MR. LIMAN: But it's not designed as a purchase
19 price adjustment. It's not designed as a purchase price
20 adjustment. And I think -- and I may be overstaying my
21 welcome here, and I apologize if I am, but I think in order
22 to give -- the three points I want to leave you with --

23 THE COURT: Well, it's just transferring. You're
24 right. Well it says "retaining," "retaining as an excluded
25 asset." I guess colloquially, that to me would be a

1 purchase price adjustment. They're not selling you those
2 old receivables. They retain it.

3 MR. LIMAN: What they would have had to have done
4 is at the time of closing and before we exercised assumption
5 rights, they would have had to have said something to
6 indicate that they were holding back on it. Just like, Your
7 Honor, if you read the provision with respect to the
8 inventory, what that says is at the time of closing, they
9 need to do something with respect to inventory.

10 We're going -- we're an operating business. To
11 say to us a week and a half after closing, we're retaining
12 something, then we already have a right to assume --

13 THE COURT: Well, but you don't know all the
14 credit card accounts receivables at the closing. You just
15 told me they can't figure it out as of today, what's pre and
16 post.

17 MR. LIMAN: They could make the claim as to --

18 THE COURT: Why do they have to? It's right in
19 the APA.

20 MR. LIMAN: Because what it says in the APA is
21 they have to retain it. They have to retain it. They
22 didn't do anything --

23 THE COURT: They don't have to. It's in the APA.
24 It's (indiscernible). I think this one you're not going to
25 convince me on. I mean, it's not something you know at the

1 closing.

2 MR. LIMAN: Your Honor, I would urge you to look
3 closely at the language of the card agreement. I do think
4 under the restatement and under the integration clause,
5 they're part of the agreement, I think they define what is
6 payable in the ordinary course and what's receivable in the
7 ordinary course.

8 I do think you have to give independent meaning to
9 the notion of "due." I think that does have the meaning of
10 law that says that it is immediately enforceable, it has to
11 be a fixed obligation. It doesn't have to be payable
12 immediately. It can be payable in 20 days, 30 days. It has
13 to be a fixed obligation. And I think their argument fails
14 on those grounds.

15 THE COURT: Okay, thanks.

16 MR. LIMAN: Thank you, Your Honor.

17 MR. FRIEDMANN: Your Honor, if I may just quickly
18 respond and clarify to a couple of the points. First of
19 all, Mr. Liman pointed to the Morrison Lincoln Mercury and
20 said we had no answer and, as we all know, lawyers hate to
21 be told they have no answer so we have an answer which I
22 have to give now.

23 They're pointing to this Eastern District
24 Tennessee case from 1983, which applied completely different
25 facts, a totally different law in determining whether or not

1 a reserve account fell under the definition of account under
2 the UCC.

3 The Delaware UCC applicable here, as you pointed
4 out, defines account as a right to payment of a monetary
5 obligation arising out of the use of credit or charge card.
6 The reserve accounts here clearly represent a right to
7 payment of monetary obligations and, under the definition of
8 the credit card accounts receivable, the key is that these
9 are accounts and the proceeds thereof resulting from those
10 charges. I don't really see how that's a disputable point.

11 The second point I wanted to make is that the
12 withholding of these credit card receivables in reserve
13 accounts does not change the fundamental character of those
14 proceeds. They continue to be credit card transaction
15 proceeds that were now withheld. They were not converted
16 and they ultimately and at all times were owed to Sears.

17 The third point is Mr. Liman was making much of
18 the term "due" in 10.9, but kept inserting the word
19 "immediately". It doesn't say immediately due, it just says
20 due. Due and owed are synonyms. If it said immediately due
21 that might be a different story. That would tie closer to
22 their notion of it being payable, but it just says due.

23 The final thing I just want to clarify in terms of
24 the relief we're seeking here, Your Honor is exactly right
25 and what the mechanisms are after the fact are different,

1 but we're looking to demonstrate that credit card accounts
2 receivable includes the reserve accounts and that therefore
3 there's a credit due to the debtors of \$4.6 million.

4 THE COURT: What is your response to Mr. Liman's
5 argument that because -- well first of all, let me ask you
6 this question. Is the money at issue here held exclusively
7 by First Data or are there other ones too that are holding
8 it?

9 MR. FRIEDMANN: So there are reserves that are
10 held by the other credit card processors as well. My
11 understanding is that First Data is holding approximately
12 \$28 million and change and then the other credit card
13 processors have some smaller amounts.

14 In terms of determining what the oldest are, my
15 understanding is the oldest \$13.3 million, if my number is
16 right, are with First Data. You would then need to go one
17 of the other credit card processors if you're looking for
18 the oldest to get the next whatever that is --

19 THE COURT: All right.

20 MR. FRIEDMANN: One point whatever million.

21 THE COURT: So, Mr. Liman's argument is that the
22 definition of credit card account receivable ends with the
23 clause in each case in the ordinary course of business and
24 his argument is that the reserve established by First Data
25 was not in the ordinary course of business because it was

1 premised upon a more recent fact, which was the lack of
2 availability of the revolving credit facility in this
3 specific amount or higher.

4 So, what is your response to that argument? This
5 isn't in the ordinary course, this deposit.

6 MR. FRIEDMANN: This is something that we
7 addressed in our brief and I think the key here is the term
8 in each case in the ordinary course of its business, what is
9 that modifying? And what it's modifying is the clause that
10 directly precedes it, which is in connection with the sale
11 of goods by a seller or services performed by a seller in
12 each case in the ordinary course.

13 It's describing how these charges came to be that
14 the credit card processor had. So, they're owed --

15 THE COURT: So you're applying the last antecedent
16 rule.

17 MR. FRIEDMANN: Correct.

18 THE COURT: Okay. It doesn't have to be owed by
19 the credit card processor in the ordinary course.

20 MR. FRIEDMANN: It's not owed in the ordinary
21 course. It's owed from proceeds resulting from credit card
22 charges and then the key is that those credit card charges
23 were from the sale of goods or the services performed by the
24 seller in the ordinary course of seller's business.

25 THE COURT: Okay.

1 MR. FRIEDMANN: Thank you, Your Honor.

2 THE COURT: How do you envision this working in
3 practice? You're saying you're above the \$1.657 billion cap
4 right now or amount right now, right?

5 MR. FRIEDMANN: That's correct. My \$14.6 million.

6 THE COURT: Right. Is that it or will there be
7 additional amounts beyond that or is this just based on the
8 reserves that you have now? We know what the reserves are.

9 MR. FRIEDMANN: Based on our understanding, based
10 on the aggregate threshold in 10.9, the \$14.6 is the total
11 amount that we were above.

12 THE COURT: Okay. So then what happens? Because
13 we clarified it's not necessarily to have the reserve
14 released, it's just that you're entitled to the excluded
15 assets or the other assets.

16 MR. FRIEDMANN: To be honest, I think the debtors
17 at this point are flexible in terms of how we get the \$14.6
18 million. If they want to write a check for \$14.6 million,
19 that works. If it's --

20 THE COURT: Or it's between you and the --

21 MR. FRIEDMANN: -- us and First Data and whoever
22 other credit card processors --

23 THE COURT: Or whoever has the oldest one.

24 MR. FRIEDMANN: Correct.

25 THE COURT: And if they still have a right to hold

1 it because of their right, you can contest that.

2 MR. FRIEDMANN: That's something we'd have to work
3 out between us and the credit card processor.

4 THE COURT: All right.

5 MR. FRIEDMANN: I'm sorry, I stand corrected. The
6 \$7 million that we've been referring to where at the time of
7 closing there was this identified \$7 million overage, that
8 was before we knew about the additional credit card
9 proceeds.

10 THE COURT: Right.

11 MR. FRIEDMANN: As I mentioned, the \$7 million,
12 the deal that was agreed to was rather than taking the
13 inventory in transit, we instead agreed to take inventory
14 that was still with the vendor and that was supposed to be
15 shipped to the going out of business stores.

16 That truck has not arrived yet, Your Honor. I
17 don't know how much traffic there was between the vendors
18 and the going out of business stores, but we have not gotten
19 that \$7 million worth of inventory either. So, it's really
20 \$14.6 million of credit card (indiscernible) plus that \$7
21 million in inventory.

22 THE COURT: Okay.

23 MR. LIMAN: Your Honor, if I could just respond to
24 that last point. My understanding is that the debtors have
25 never given any instruction to the vendors with respect to

1 it.

2 THE COURT: On where that's supposed to go?

3 MR. LIMAN: As to where it's supposed to go. The
4 first we heard of a complaint with respect to that was in
5 their papers and I think they, frankly, have -- I understand
6 we've got a lot of balls in the air. This one looks to me
7 that they've dropped.

8 I think, Your Honor, has the point with the \$15
9 million that First Data has agreed to put in escrow. It's
10 not the older stuff of the reserves.

11 THE COURT: Right. Okay. All right. I have
12 before me the motion by the debtors in this case to compel
13 turnover of estate property under Section 542 of the
14 Bankruptcy Code. At issue in the motion is the
15 interpretation and application of the asset purchase
16 agreement between the debtors and Transform Hold Co. More
17 specifically, for purposes of this hearing, this ruling
18 without ignoring the rest of the motion which the parties
19 seem to be working through, whether certain reserves held by
20 credit card processing companies constitute credit card
21 accounts receivable, or CCAR, as defined in the asset
22 purchase agreement, of APA, and, in addition, whether if
23 they do in fact constitute credit card accounts receivable,
24 whether Section 10.9 of the APA has been triggered or not,
25 which involves I believe as a contested basis only the issue

1 of whether such credit card accounts receivable and "due" to
2 the seller, i.e., the debtors.

3 I believe that this issue can and should be
4 decided based on the plain meaning of the asset purchase
5 agreement pursuant to APA Section 13.8, the laws of the
6 State of Delaware govern the agreement and construction of
7 contract language under Delaware law is a question of law.
8 Rhone-Poulenc company v. American Motorist Insurance
9 Company, 616 A.2d 1192, 1195, (Del. 1992). The primary
10 consideration in interpreting contract is "to attempt to
11 fulfill to the extent possible the reasonable shared
12 expectations of the parties at the time they contracted."

13 Comrie v. Enterasys Networks Inc., 837 A.2d 1, 13
14 (Del. Ch. 2013) where contract language is clear and
15 unambiguous, under Delaware law the ordinary and usual
16 meaning of the chosen words will generally establish the
17 parties' intent, Matthew v. Laudamiel, 2012 WL 2508572 at
18 page 5 (Del. Ch. June 29, 2012).

19 Courts must be circumspect when considering a
20 contract's language, especially when the contract is between
21 sophisticated commercial entities. Creating ambiguity and
22 ambiguity where none exists could in effect create a new
23 contract with rights, liabilities and duties to which the
24 parties have not assented. Cypress Semiconductor Corp. v
25 SVTC Technologies., LLC, 2012 WL 2989169 at page 4,

1 Del.Super., 2012 June 29, 2012, O'Brien v. Progressive
2 Northern Insurance Company, 785 A.2d 281-288 (Del. 2001).

3 An ambiguity exists when the provisions in
4 controversy are fairly susceptible of different
5 interpretations or may have two or more different meanings,
6 GMG Capital Investments, LLC v. Athenian Venture Partners I,
7 L.P. 36 A.3d 776, (Del.Supr., January 03, 2012).

8 Contract language is not ambiguous merely because
9 the parties dispute what it means, Alta Berkeley VI C.V. v.
10 Omneon, Inc., 41 A.3d 381 (Del.Supr., 2012, March 05, 2012).

11 Delaware adheres to the objective theory of
12 contracts under which a contract is construed as it would be
13 understood by an objective reasonable party.

14 The Court, of course, should not interpret a
15 contract provision to yield an asserted result or a result
16 that would render other provisions null, Martin Marietta
17 Materials Inc., v. Vulcan Materials Company 2012 WL 2819464
18 (Del.Supr., May 14, 2012). See also GMG Capital
19 Investments, 36 A.3d 779.

20 But again, based on my review of the parties'
21 agreement, I do not believe that I need to look at parol
22 evidence and that the clear and unambiguous ordinary usual
23 meaning of the words chosen by the parties in their context
24 should govern.

25 APA Section 1.1 defines credit card accounts

1 receivables, "Each Account or Payment Intangible each as
2 defined in the UCC together with all income payments and
3 proceeds that are owed by a credit card payment processor or
4 an issuer of credit cards to a seller", the seller meaning
5 the debtors, "resulting from charges by a customer of the
6 seller on credit cards processed by such processor or issued
7 by such issuer in connection with the sale of goods by a
8 seller of services performed by a seller in each case in the
9 ordinary course of its business."

10 This term becomes relevant for purposes of this
11 dispute because Section 10.9 of the APA entitled Inventory
12 and Receivables provides the following; "The aggregate
13 amount of 1) the inventory value of the acquired inventory,
14 excluding any pending inventories, 2) the amount due to
15 seller in respect to a) the credit card accounts receivable
16 and 3) pharmacy receivables shall be at least \$1.657
17 billion. To the extent that the aggregate amount of items 1
18 through 3 in the foregoing sentence exceeds \$1.657 billion
19 on the closing date, the sellers may reduce such amount to
20 be equal to \$1.657 billion by first, transferring at
21 sellers' expense and in consultation with buyer inventory
22 that would otherwise be acquired inventory to a GOB leased
23 store or a GOB owned store or any other location designated
24 by sellers that is not a property, until the inventory value
25 of the acquired inventory is equal to \$1.553 billion and

1 second, retaining as an excluded asset, that is an asset not
2 purchased by the buyer, the oldest of any credit card
3 accounts receivable or pharmacy receivables."

4 I believe it is undisputed that the \$1.657 billion
5 threshold in Section 10.9 has been met and that there are
6 disputed assets, disputed in the sense that there are credit
7 card accounts receivable were not in excess of that number,
8 the debtors therefore contend that the excess oldest coming
9 first should be treated as an excluded asset and not part of
10 the assets purchased by Transform Hold Co.

11 Transform Hold Co disputes this provision or this
12 interpretation on two grounds. First, it contends that the
13 disputed credit card accounts receivable are not credit card
14 accounts receivable, but are instead covered by a different
15 definition in the APA, namely the definition of a security
16 deposit, which is found in APA Section 2.1(o).

17 That section defines a security deposit as, "Any
18 and all rights to sellers in and to any restricted cash,
19 security deposits, letters of credit, escrow deposits and
20 cash collateral, including cash collateral given to obtain
21 or maintain letters of credit and cash drawn or paid on
22 letters of credit (indiscernible) deposits, performance,
23 payment of surety bonds, credits, allowance, prepaid rent or
24 other assets, charges, setoffs, prepaid expenses, other
25 prepaid items and other security, collectively security

1 deposits, together with all contracts, agreements or
2 documents evidencing or related to the same in each case to
3 the extent related to any acquired asset."

4 There is another potential definition that would
5 apply to the disputed credit card accounts receivable here,
6 which is the APA's definition of claim as all rights to
7 payment, which then tracks the Bankruptcy Code definition in
8 1015.

9 I have now had the chance to review all of the
10 credit card servicing agreements under which the disputed
11 credit card accounts receivable are governed and pursuant to
12 which those amounts are being held by the credit card
13 servicers.

14 Those agreements are filed under seal and I will
15 resist quoting extensively from them. Instead I will note
16 merely that based on my review of each of them, including
17 the First Data, AmEx and Discover agreements, there is a
18 common thread whereby each processor or servicer owes or has
19 an obligation to pay the Debtor and in one case aptly is
20 described as a provisional credit for all of the proceeds of
21 the credit card transactions at the Debtors' stores or
22 otherwise with the Debtor.

23 But has the right to setup a reserve account for
24 chargebacks, credits or adjustments, current or anticipated
25 card organization fees or fines in the amount of any fees or

1 discounts due. There is no formal security agreement
2 language in these contracts, but they each recognize that
3 the basis for such reserve amounts ultimately relies upon
4 the right of setoff and/or recoupment.

5 As I previously quoted, a right of setoff is one
6 of the rights that falls within the definition of security
7 deposit and I conclude that accordingly the funds being held
8 legitimately and there's been no dispute that they have been
9 illegitimately held by the credit card processors under
10 their respective reserve right agreements, would constitute
11 security deposits as a defined term under Section 2.1(o) of
12 the APA.

13 Again, the fundamental point being that they're
14 being held pursuant to a right of setoff recognizing that,
15 to the extent that there are no amounts owed over by Sears
16 in the nature of chargebacks, adjustments, fees and the
17 like, they would be owed by the credit card processors to
18 the debtors.

19 My conclusion that the money at issue here
20 constitutes a security deposit does not however lead me to
21 conclude that it is not also a credit card accounts
22 receivable. There is no carveout in the definition of
23 credit card accounts receivable for security deposits and
24 the fact that it would be covered by the defined term
25 security deposit, does not also mean that it wouldn't be

1 covered by the term credit card accounts receivable.

2 That is particularly the case given that the only
3 operative provision we're focusing on here as far as the
4 underlying dispute is 10.9, which itself does not make the
5 distinction or any distinction between credit card accounts
6 receivable and security deposits.

7 So, I believe that having now read all of the
8 relevant provisions of the credit card processing agreement,
9 the argument by Transform Hold Co that the money at issue is
10 a security deposit is a red herring.

11 That still leaves the issue of whether the money
12 does fall within the definition of credit card accounts
13 receivable. Having carefully considered the parties'
14 arguments and reviewed the applicable provisions in the
15 context of the entire agreement, I conclude that the funds
16 at issue are credit card accounts receivable within the
17 meaning of APA Section 1.1.

18 I believe that under the parties' own definition,
19 this money does in fact constitute an account for purposes
20 of the UCC as well as a payment intangible. Delaware's
21 version of the UCC provides in Section 9.1022 that an
22 account means a right to payment of a monetary obligation,
23 whether or not earned by performance.

24 It includes, among other things, in (g) arising
25 out of the use of a credit or charge card or information

1 contained (indiscernible) within the card.

2 Payment intangible in Section 61 of that section
3 of the Delaware UCC means a general intangible under which
4 the account debtors' principal obligation is a monetary
5 obligation.

6 As noted, the credit card processors have a
7 monetary obligation and owe money to the Debtors arising out
8 of their processing of credit cards used by customers of the
9 Debtors.

10 It's clear to me that they owe this money based on
11 my review of the processing agreements themselves which base
12 their right to hold the money on the mutual obligation that
13 the Debtor owes them for chargebacks and future other
14 amounts that would be owed either by nature of setoff or
15 recoupment under the processing agreements, i.e., these
16 reserves are being held on account of amounts owed mutually
17 by both parties to the transaction even though neither party
18 has an immediate payment obligation, hence the use of the
19 term "reserve."

20 Transform Holdco contends that those obligations,
21 and more specifically the mutual obligation owed by the
22 respective processors to the Debtors, is neither one in
23 connection with the sale -- I'm sorry, is not -- is neither
24 resulting from charges by a customer of a seller on credit
25 card processed by such processor or in the ordinary course

1 of the -- of business. On the latter point, it appears that
2 one of the processors, First Data, exercised its right to a
3 reserve based upon a specific triggering fact under Section
4 4.7 of its agreement pertaining to the availability of
5 revolving credit facility in the specified amount.

6 Transform Holdco also argues that the obligation
7 owed by the credit card processor to the Debtor is different
8 from the definition of account that I previously read and
9 does not result from charges by a customer of the Debtors
10 for the use of the credit cards processed by the processor.
11 As to that latter point, I disagree. I believe that the
12 language is more than broad enough in the definition of
13 Section 1.1(a) both in its incorporation of the term
14 "account" and in its use of the phrase "resulting from" to
15 encompass the obligation, albeit not yet -- not necessarily
16 realized on the -- closing it as a due obligation that is
17 due in the sense of immediately due to make payment to the
18 Debtor, but nevertheless, (indiscernible) owed obligation to
19 give rise to a right of setoff.

20 And it would ultimately be owed once the customer
21 chargeback and related grounds for setoff were determined,
22 resulting from language obviously on its face is quite broad
23 as is the definition of account in the Delaware UCC that I
24 have previously quoted, namely a right to payment whether or
25 not earned by performance which can rise among other things

1 out of the use of the credit or charged card. That's the
2 entire basis for the relationship between the processors and
3 the Debtor and I believe what was contemplated by this
4 provision.

5 That leaves the issue of the meaning of the phrase
6 at the end of the definition "in each case in the ordinary
7 course of its business." It appears clear to me and as is
8 consistent with the last antecedent rule of interpretation
9 that this phrase refers to the ordinary course of incurrence
10 of the credit card charges in the first place and not any
11 unusual relationship separate and apart from that between
12 the processor and Sears.

13 That leaves the remaining defense raised by
14 Transform Holdco that notwithstanding the inclusion of the
15 reserved security -- the reserved amounts by the credit card
16 processors in the term "security deposit," such amounts are
17 also included within the term "credit card accounts
18 receivable." The operation of Section 10.9 restricts the
19 particular credit cards receivable amounts that go to the
20 \$1.657 billion cap to amounts due to the seller as
21 pertaining to amounts immediately due or actually and
22 presently due and payable to be paid to the seller
23 immediately. Of course, those extra words are not in the
24 phrase. The phrase merely uses the word "due to seller."

25 The plain meaning of this term I believe is on all

1 fours with the term "owed" as opposed to immediately due.
2 And I believe that interpretation is consistent with the
3 definition of credit card accounts receivable and the
4 operation of this provision which I believe requires the
5 parties to look at the credit card accounts receivable with
6 a snapshot which however takes into account information they
7 learn post-closing as to whether they are in fact owed as of
8 the closing date. You would not know that calculus until
9 after the closing date, and I believe that requires one to
10 take into account that they need not be immediately payable
11 but rather simply owing to the seller as of the closing
12 date. I say that in part based on the nature of the
13 adjustment that's laid out in Section 10.9.

14 So in light of that conclusion, I will grant the
15 Debtors' motion insofar as it seeks to implement Section
16 10.9 by including within it all amounts in the respective
17 reserve accounts to the extent that they are not actually
18 applied by the credit card processors appropriately to
19 amounts that Sears owes the processors, again, as of the
20 closing date.

21 So the Debtors can email an order to that effect
22 to chambers. You don't need to formally settle the order on
23 counsel for Transform Holdco, but you should run it by them
24 before you email it to chambers so that they can make sure
25 it's consistent with my ruling.

1 There is a separate aspect of the relief sought by
2 the Debtors for a declaration that Transform Holdco had
3 violated the automatic stay by not causing such funds to be
4 paid over. It appears to me that this issue was complex
5 enough and that the funds in fact were being held by a third
6 party that to the extent there was any violation of the
7 automatic stay, given the prompt resolution of the matter,
8 there should be no damages flowing from it. So I will deny
9 that aspect of the motion on that basis that to the extent
10 there's any violation of the stay, it would not give rise to
11 any independent or separate obligation by Transform Holdco
12 to the Debtors.

13 MR. SCHROCK: Your Honor, Ray Schrock for the
14 Debtors. Just to clarify, there were two other issues
15 raised in the motion to enforce the February rent proration
16 and the cash in transit.

17 THE COURT: Right. But as I understand, the
18 parties are still leaving those open at least for a few
19 days.

20 MR. SCHROCK: Exactly, Your Honor.

21 THE COURT: Okay.

22 MR. SCHROCK: And my --

23 THE COURT: So this is just a partial resolution
24 of the motion, this ruling.

25 MR. SCHROCK: Understood. Just as a matter of

1 procedure to make sure that, you know, we keep these issues
2 open, there were some other issues that were raised by
3 Transform Holdco related to amounts that the Debtors believe
4 are due to them and they believe their ongoing disputes were
5 working through them.

6 And just so that we can be efficient, Your Honor,
7 and make sure that these issues remain in front of the
8 Court, you know, we can always file I know a declaratory
9 judgment action to bring it in front of the Court, but we've
10 got a current motion, you know, to enforce. If the parties
11 can't work these other open issues out that were raised by
12 Transform Holdco and the Debtors, you know, we'd like to
13 have an efficient vehicle to frankly put them up for a
14 hearing under the current motion.

15 THE COURT: I mean you would have to give me
16 papers on them one way or the other because --

17 MR. SCHROCK: Exactly.

18 THE COURT: -- they're new issues. So I leave it
19 up to the parties whether -- I mean you probably ought to
20 just file something new on it --

21 MR. SCHROCK: Okay. Fair enough, Judge. That's
22 what --

23 THE COURT: -- unless it's really an outgrowth of
24 the issues that are covered by this current motion.

25 MR. SCHROCK: No, that's fine, Your Honor. We'll

1 just file something new. And I do want to raise them just
2 because they're -- you know, some of them like for instance,
3 you know, the payment of the \$166 million other payables,
4 they're relevant to -- you know, there's a number of parties
5 that are requesting administrative payments. And so they're
6 fresh so we're going to have to move on them, you know,
7 relatively quickly.

8 THE COURT: Right. Okay.

9 MR. SCHROCK: Thanks very much, Your Honor. I
10 believe the next item on the agenda is Wilmington Trust's
11 motion for related to cash collateral.

12 THE COURT: Okay. Now I've been going for a while
13 now. I'm fine to keep going, but if anyone wants to take a
14 break, they can do it. No? Okay, let's go ahead with that
15 motion then.

16 MR. FOX: Good afternoon, Your Honor. Edward Fox
17 with Seyfarth Shaw on behalf of Wilmington Trust, National
18 Association as Indenture Trustee and Collateral Agent. Your
19 Honor, this is a motion by Wilmington Trust to prohibit or
20 condition the Debtors' continued use of cash collateral.

21 At the outset, I just want to clear up one issue
22 the Debtors have raised in their objection a question about
23 Wilmington Trust's standing. Mr. Schrock contacted me last
24 evening to advise that they were not going to pursue that
25 objection and that they recognize that we are the collateral

1 agent and have standing to make the motion.

2 THE COURT: Okay.

3 MR. SCHROCK: That's correct, Your Honor.

4 THE COURT: But you're not waiving your rights
5 that they may be unsecured or undersecured?

6 MR. SCHROCK: That's correct, Your Honor. But I
7 believe that given that they're collateral agent for the
8 entire cap stack over there, we weren't going to frankly
9 waste a lot of time arguing about standing.

10 THE COURT: Okay. That's fine.

11 MR. FOX: Your Honor, the Court entered an order
12 in November of 2018. It's a final order authorizing the
13 Debtors to obtain and get financing in the roll-up DIP of
14 the first lien and also to use cash collateral. And that
15 cash collateral is cash collateral in which the holders of
16 the pre-petition second lien obligations have an interest as
17 it secures their outstanding obligations as well.

18 Under the terms of the order, the Debtors were
19 authorized to use cash collateral subject to and consistent
20 with the terms of the approved budget which was a defined
21 term. And the approved budget was annexed as Exhibit C to
22 the order that was entered. And we included a copy at the
23 end of my declaration as well. That budget, that approved
24 budget carried the Debtors through February 16, 2019 which
25 as it turned out was five days after the closing of the sale

1 substantially but not all of the Debtors' assets.

2 There as far as we know and have been advised
3 there was no extension of that budget, although I'll get to
4 the Debtors have a view about that. But to the extent there
5 was any extension by the DIP ABL lenders, the Debtors would
6 concede that that did not take them beyond March 16th of
7 2019.

8 THE COURT: Well, what the DIP ABL lenders paid
9 out?

10 MR. FOX: Yes, they were.

11 THE COURT: So why would they agree to -- why
12 would they bother to deal with an extension?

13 MR. FOX: Well, we don't believe they ever did.
14 In fact, they told us to the contrary.

15 THE COURT: So why -- because they're paid.

16 MR. FOX: Yes.

17 THE COURT: They shouldn't be spending any more
18 time on the file.

19 MR. FOX: I agree, Your Honor.

20 THE COURT: So why is that extension even
21 relevant?

22 MR. FOX: Well, it's only relevant because the
23 Debtors have raised that as a defense.

24 THE COURT: No. But what I'm saying is you're
25 relying on their not consenting to an extension of the

1 budget, but there's a pretty good reason why they're not
2 consenting, which is they're not paid. That doesn't mean
3 that you somehow have a right to consent.

4 MR. FOX: And we're not suggesting that we do,
5 Your Honor.

6 THE COURT: So but the whole right is theirs. And
7 it's a pretty good reason why they haven't consented.

8 MR. FOX: I understand that, Your Honor, but the
9 order is conditioned -- it limits the Debtors to making
10 expenditures in accordance with that budget. If there's no
11 budget anymore, then there's no right under the order for
12 the Debtors to continue to use cash collateral going
13 forward.

14 THE COURT: So --

15 MR. FOX: Otherwise what we end up with is an
16 order that as the Debtors read it would allow them to do
17 whatever they wish with respect to cash collateral with no
18 limitations whatsoever. And according to them, the second
19 lien which is now the only remaining lien has no ability to
20 have anything to say about what they can or cannot do with
21 that cash collateral. And according to them, it even
22 seemingly prevents us from coming back to the Court to ask
23 the Court to address that issue either by enforcing the
24 order or alternatively under 363(e).

25 So we're in a situation now where as I said, we

1 believe --

2 THE COURT: So I'm sorry. So you're saying that
3 the authority to use cash collateral ended on the payout of
4 the DIP lenders and ABL lenders?

5 MR. FOX: Well, that's effectively what happened
6 because the Debtors' ability to comply with the terms of the
7 order that was entered no longer exists.

8 THE COURT: Is there any disagreement about the
9 use of the cash collateral?

10 MR. FOX: You mean going forward between us?

11 THE COURT: Yes.

12 MR. FOX: We've not had that discussion. The
13 Debtors -- I mean we're open to having that.

14 THE COURT: Well, don't you think you should do
15 that before precipitating a totally unnecessary crisis of
16 this case where the Debtors can't use any cash?

17 MR. FOX: Your Honor, we wrote to the Debtors and
18 asked before filing the motion and asked them to explain the
19 basis on which they continue to believe that they're
20 entitled to spend cash collateral. They responded and said
21 they were entitled to. I spoke with Mr. Schrock before we
22 filed the motion, and we've had conversations since then and
23 there's --

24 THE COURT: All right. Well, maybe the question's
25 addressed to the both of you.

1 MR. FOX: I'm happy to have that --

2 THE COURT: Well, I think you should.

3 MR. FOX: Okay.

4 THE COURT: I could go through this and I will if
5 you want, and I think pretty much come up with the argument
6 that as drafted, neither your argument nor the Debtors'
7 argument makes a whole lot of sense. Normally there's a
8 provision in these that says that, you know, under
9 materially changed circumstances, lenders can come back and
10 dispute the use of cash collateral. Well, that's not in
11 here as far as I can see.

12 On the other hand, to argue that you gave your
13 cash collateral rights up to the DIP and ABL lenders but
14 somehow got them back when they were paid in full, it's a
15 bit of a stretch to just throw the bomb into the case. So I
16 think you all should meet, work through a process, and if
17 you can't do it, I'll decide it because that's really what
18 we're talking about here.

19 MR. FOX: We're happy to do that.

20 THE COURT: Okay.

21 MR. FOX: It takes two to tango.

22 THE COURT: Well, that's true. So you all should
23 start tangoing. Actually, it's three because the Committee
24 would be involved, too. So that'll be an interesting dance,
25 but that's how it works.

1 MR. SCHROCK: Judge, I --

2 THE COURT: And by the way, there's no limitations
3 under 506(c) and 105 either or 552 as far as the -- 506(c),
4 excuse me, on I think on certain parties here. So, you
5 know, we should just get to what's real here which is if you
6 really believe the Debtors are wasting your cash collateral,
7 I understand. If they aren't, then we should just move on
8 to get the case over with.

9 MR. FOX: Our concern is, Your Honor, that there's
10 a limited amount of cash available and but for the previous
11 motion, there's nothing else coming into the estate. So
12 what we're left with is seeing the cash continue to be spent
13 with nothing to replace it but for --

14 THE COURT: Well -- but honestly, what's the
15 alternative? I mean if they can't spend the cash at all,
16 then you're going to be dealing with the Trustee who you're
17 going to be paying. And I guess I could understand why
18 targets of litigation might somehow think that's right,
19 although I imagine the Trustee would hire the same people
20 that analyzed those causes of action over the last few
21 months so that they can file a, you know, 110-page
22 complaint.

23 So I just think the parties should get real here
24 and see where they are as far as a timeline to get out of
25 the case. And I'm not suggesting you're not being real. I

1 understand your point. You see this glitch in the
2 agreement. It's the type of glitch that would drive an
3 indenture trustee crazy. I understand that. Let's just be
4 realistic about it.

5 MR. SCHROCK: And, Your Honor, we're happy to sit
6 down with them. I think the fundamental issue just that is
7 going to before the parties. So we have been using cash
8 collateral because we believe we're authorized to do so. I
9 think they've raised this issue. We looked at the order as
10 we did, you know, with the closing and we said, listen,
11 we're going to have to sit down obviously at some point to
12 deal with this. I think they want us, some of the second
13 lien parties who don't have rights against the winddown
14 account are looking at the Debtor saying, hey, why don't you
15 use the winddown account proceeds at this point and start to
16 get --

17 THE COURT: Well, I don't know. I mean that --

18 MR. SCHROCK: And so we have to work that out.

19 THE COURT: That comes through very remotely in
20 the papers, but --

21 MR. SCHROCK: Yes.

22 THE COURT: -- those rights are defined.

23 MR. SCHROCK: Yes.

24 THE COURT: And the carveout is defined.

25 MR. SCHROCK: Right.

1 THE COURT: And frankly, the APA which lays out
2 the mechanism for what I think isn't covered by the carveout
3 and the winddown is something that clearly the movant and
4 the parties joining in this motion and the DIP lenders and
5 the ABL lenders were all perfectly fine with. So, you know,
6 I don't know what we're talking about here except maybe
7 trying to get some leverage in the plan negotiation process
8 which isn't going to work.

9 MR. SCHROCK: And, Your Honor, if I could just
10 make a suggestion then. We'll sit down. We'll try and work
11 it out. If we can't we'll contact the Court and --

12 THE COURT: Okay.

13 MR. SCHROCK: -- just have a quick status
14 conference to discuss how to proceed.

15 THE COURT: That's fine.

16 MR. SCHROCK: (Indiscernible).

17 MR. FOX: Sure.

18 THE COURT: Okay.

19 MR. FOX: Thank you, Your Honor.

20 THE COURT: Okay.

21 MR. O'NEAL: Sean O'Neal with Cleary Gottlieb on
22 behalf of the ESL. I only stand up just to confirm that
23 we'll be part of those discussions as second lienholders.

24 THE COURT: Well, I don't know. I mean there are
25 specific provisions of the DIP order that deal with ESL.

1 And your colleague behind you for --

2 MAN: Cyrus.

3 MR. O'NEAL: Yes.

4 THE COURT: So --

5 MR. O'NEAL: Understood, Your Honor. Though --

6 THE COURT: I mean the indenture trustee is the
7 one with the lien.

8 MR. O'NEAL: Well, also, let's be clear we're
9 talking about the collateral agent which is Bloomington
10 Trust. He's also the indenture trustee for one of the
11 tranches.

12 THE COURT: Look, if they try to --

13 MR. O'NEAL: But ESL does --

14 THE COURT: If they're trying to take something
15 away from your clients, you and Cyrus, yes, absolutely.

16 MR. O'NEAL: Yes.

17 THE COURT: If you want to be involved.

18 MR. O'NEAL: Just to be clear that ESL as a second
19 lienholder does have adequate protection liens and claims.
20 We do have those.

21 THE COURT: Well, there are lots of reserved
22 right.

23 MR. O'NEAL: Yes.

24 THE COURT: That's all I can say.

25 MR. O'NEAL: But we actually have those liens.

1 THE COURT: Right.

2 MR. O'NEAL: And they're in the order and actually
3 discussed in the settlement.

4 THE COURT: You do. And it's to protect for
5 diminution of collateral in the process where ESL became the
6 buyer of the company. So --

7 MR. O'NEAL: Correct, Your Honor.

8 THE COURT: -- you know, let's --

9 MR. O'NEAL: Okay. And I just wanted to --

10 THE COURT: I think that also had -- let's get
11 real here.

12 MR. O'NEAL: Thank you, Your Honor.

13 THE COURT: Okay. I.e, it goes what it wanted.
14 So it's hard to argue with diminished.

15 MR. KRELLER: Your Honor, Thomas Kreller with
16 Milbank, LLP, on behalf of Cyrus Capital. I'll be brief,
17 Your Honor. Just to be clear and for the record, the notion
18 was not that the consent to the use of cash collateral was
19 being withdrawn, thereby leaving the Debtors with no ability
20 to use cash.

21 THE COURT: Right.

22 MR. KRELLER: We're exactly in the scenario, and
23 this is the adequate protection was negotiated this way. We
24 negotiated for adequate protection. We gave consent to cash
25 collateral. The Debtors negotiated for a winddown reserve.

1 If you were to shut off the use of cash collateral, they
2 would turn to their winddown reserve which is if the
3 winddown reserve is not to cover the cost of the case post-
4 closing to plan confirmation, I don't know what else it is
5 for.

6 And if you look at the budget that the Debtors --

7 THE COURT: Well, there's a carveout.

8 MR. KRELLER: There's a --

9 THE COURT: And there are certain -- let me just
10 see.

11 (Pause)

12 MR. KRELLER: Your Honor, there's actually --

13 THE COURT: There's a -- the waiver of 506(c) I
14 don't think covers your clients. So, again --

15 MR. KRELLER: Your Honor?

16 THE COURT: -- it's not that simple.

17 MR. KRELLER: Your Honor, I'm trying to make a
18 different point. The Debtors attached a budget to their
19 reply where they show a winddown account with \$93 million in
20 it. So I don't think that it's a fair characterization to
21 say the lenders are stepping up, the second lien creditors
22 are stepping up trying to shut the Debtors off of the use of
23 cash collateral. The Debtors have a \$90 million --

24 THE COURT: I'm not --

25 MR. KRELLER: -- winddown budget.

1 THE COURT: I mean I said to Mr. Fox I understand
2 why the collateral agent and indenture trustee brought this
3 motion. But I think that who should be funding this case is
4 not nearly as simple as you posit. The winddown account
5 among other things was meant to take into account and
6 protect against the risk of administrative insolvency, to
7 protect administrative expense creditors, to protect
8 503(b)(9) creditors who have administrative expense claims.
9 It wasn't just to wind down from now going forward. That's
10 a nice name for it, but I believe it was meant to cover more
11 than that. And instead, it wasn't -- we have the 506(c)
12 issues.

13 MR. KRELLER: Understood, Your Honor. I think
14 there's a burden on the 506(c), particularly with respect to
15 my client Cyrus who is not the buyer. But that'll be for
16 another day.

17 THE COURT: Well, it will because I think they're
18 fairly close to each other.

19 MR. KRELLER: Your Honor, we'll make the record
20 clear on that.

21 THE COURT: Okay.

22 MR. KRELLER: We're not an insider. We are not
23 the buyer.

24 THE COURT: Okay.

25 MR. KRELLER: The point is this, Your Honor. The

1 winddown budget, you're right, is there to protect
2 administrative creditors. It's not at the moment protecting
3 super priority administrative creditors. The debtors are
4 marshaling their cash and using cash collateral without
5 consent in a manner designed to allow them to pay
6 administrative expenses, regular way administrative expenses
7 during the case in a case where there may not be cash as
8 when we stand at the confirmation to pay the 507(b) claims.

9 THE COURT: To the extent there are any, but
10 again, you have to look at -- again, that's where 506(c)
11 comes into place. You know, I don't know what the snapshot
12 on the start of the case and the snapshot at the end of the
13 case will look like and whether as was argued to me the sale
14 which the ongoing administrative expenses clearly
15 contributed to the value of actually enhanced the value of
16 your client's collateral. So those are all open issues.

17 MR. KRELLER: Your Honor --

18 THE COURT: It's not that easy to decide in
19 advance and it's probably something that the parties should
20 try to resolve not in terms of doing a budget that specifies
21 exactly where the money is going to come from, or at least
22 leaves open -- let's put it that way. It should leave open
23 reallocation of it. It's fungible in other words.

24 MR. KRELLER: It is fungible, Your Honor, and
25 that's actually a good point. Number one, we've begun that

1 dialogue. In fact, we made a proposal to the Debtors in the
2 beginning of March. We are still awaiting a
3 counterproposal.

4 THE COURT: Okay.

5 MR. KRELLER: And just so to size this for you a
6 bit, we believe Cyrus' position is that our 507(b) claim is
7 in the neighborhood of \$60 million to the point of closing
8 plus then whatever collateral of ours has been dissipated
9 since then in our position without our consent.

10 And, Your Honor, to the extent it's fungible, the
11 other problem that I want to alert you to because I think
12 what you would hear from Mr. Schrock is the DIP order says
13 we don't have a lien on the winddown budget and we can't
14 access that, what that means -- what that doesn't mean is
15 that doesn't override the requirement under 1129(a)(9) that
16 if we have an allowed 507(b) claim, it has to be paid in
17 full.

18 THE COURT: That's true.

19 MR. KRELLER: And so --

20 THE COURT: But the key word there is "if."

21 MR. KRELLER: Absolutely, Your Honor.

22 THE COURT: Okay.

23 MR. KRELLER: But my point is this. What -- the
24 risk that we have is that come plan time, Mr. Schrock stands
25 up and says you don't have any rights to that winddown

1 reserve and there's no other cash to pay our 507(b) claim.
2 I don't think they can override 1129(a)(9) in that fashion,
3 and I expect that's probably something we'll confront if
4 we're unable to resolve this consensually.

5 THE COURT: Well, clearly, I can't confirm a plan
6 unless parties consent. But that's not today's issue, which
7 is why I suggest that when you work out a budget, you leave
8 the issue of allocation to another day which is not that far
9 off. It's like 30 days from now --

10 MR. KRELLER: Your Honor --

11 THE COURT: -- or 60 days from now.

12 MR. KRELLER: -- we'll be happy to do that, to
13 work out a budget. We would have to see a budget and this
14 is the first we've --

15 THE COURT: Sure.

16 MR. KRELLER: And our concern, Your Honor, is Mr.
17 Schrock stands here and says it's a simple waterfall plan.
18 The problem with that is you need water. And it's not clear
19 there's a whole lot of water here.

20 THE COURT: Well, okay.

21 MR. KRELLER: So, Your Honor, we'll work -- and
22 the super priority claims to the extent they exist and are
23 ultimately allowed, are being made to bear that risk.

24 THE COURT: Okay.

25 MR. KRELLER: Thank you, Your Honor.

1 MR. SCHROCK: We'll be happy to sit down, Judge.

2 THE COURT: Okay.

3 MR. SCHROCK: They took all the water, but we're
4 trying to deal with that. Thank you, and we'll be back in
5 touch with the Court if we can't work that out.

6 (Pause)

7 MR. FRIEDMAN: Your Honor, Jared Friedman, Weil
8 Gotshal, on behalf of the Debtors. The next two agenda
9 items, Number 3 is supposed to be the motion of Debtors to
10 compel turnover of estate property.

11 THE COURT: Yes.

12 MR. FRIEDMAN: And Number 4 is dealing with
13 related issues. It's the motion of the Community Unit
14 School District 300 for relief from the automatic stay or in
15 the alternative for abstention. I spoke to the school
16 district's counsel prior to the hearing today. They
17 requested if it's amenable, the Court is amenable to it to
18 flip the order of those because the motion for stay also
19 includes a request for an abstention, they asked to have
20 that heard first because in the event that they're
21 successful on that, that might moot our motion for turnover.

22 We have no objection if they want to proceed in
23 that order, but we'd leave it to Your Honor to make that
24 determination.

25 THE COURT: Okay. That's fine.

1 MR. FRIEDMAN: It's their motion. I'll turn it
2 over to them.

3 THE COURT: Okay.

4 MR. GENSBURG: Good afternoon, Your Honor. Matt
5 Gensburg on behalf of Community Unit School District 300.
6 Your Honor, I have a number of colleagues. We sort of split
7 the tasks here, so I'd like to introduce a couple of folks
8 to you if I may. I have Alan (indiscernible) is my co-
9 counsel in bankruptcy. I got Ken Florey is municipal law
10 and tax counsel. And Cory (indiscernible) who's also a
11 municipal law tax counsel.

12 Your Honor, there's really four matters in front
13 of you that all revolve around the same thing or related to
14 the same thing. There's our motion to modify the stay, and
15 in that motion, we also included a request for abstention
16 under 1334(c)(2) and 1334(c)(1). There's a motion of the
17 Debtor to compel turnover under 542. And then there's a
18 related motion to strike the declaration of Mr. Meghji.

19 When you think about the flow of the analysis,
20 Your Honor, we thought it made sense for the Court to
21 consider the 1334(c)(2) matter first, mandatory abstention,
22 because we believe that all those elements are met and if
23 the Court agrees with us, that none of the other issues need
24 to be dealt with today. And so with the Court's indulgence,
25 I'd like to go through our analysis of 1334(c)(2), answer

1 any questions Your Honor may have with respect to that.

2 THE COURT: Okay. Before we start on that, what
3 would the school district get back under the EDA Act if the
4 funds are not distributed to the Debtor?

5 MR. GENSBURG: So the school district, Your Honor,
6 is the largest taxing district involved. We would get 60
7 percent of that.

8 THE COURT: Okay. All right.

9 MR. GENSBURG: So, Your Honor, I'm going to start
10 with 1334(c)(2) which states basically that the Court must
11 abstain from the proceeding if six prerequisites are
12 satisfied. Those prerequisites are timely motion has been
13 made, the proceeding is based on state law claim or state
14 law cause of action, the proceeding is related to a case
15 under Title 11, the proceeding does not arise under or arise
16 in a case under Title 11. But absent jurisdiction under
17 1334, there would be no federal jurisdiction here at all
18 over this matter entitling adjudication of the Court
19 original jurisdiction.

20 Every one of those elements are met. So let's
21 take each one. First, timely motion. We filed our motion
22 to modify the stay and our request for abstention on
23 November 12th of 2018. You might recall, Your Honor, I'm
24 sure you read all the pleadings --

25 THE COURT: No, I don't have an issue on your

1 client's timeliness.

2 MR. GENSBURG: I'm sorry, sir.

3 THE COURT: I don't have an issue on that point.

4 MR. GENSBURG: Okay. We'll go on. State law, I
5 don't think anyone's disputing that the matters at issue
6 right now between Sears and the school district involves
7 exclusively issues of state law and state law claims causes
8 of action. This involves the Illinois EDA Act. It's a
9 unique Illinois legislation, also involves an economic
10 development agreement entered into by Sears in 1990 which
11 implemented the Illinois EDA Act.

12 When you look at the briefs, a large portion of
13 the briefs are just voided to try and interpret this
14 legislation. And, you know, we filed our action, the
15 Illinois action pre-petition. If this case were to go away
16 and were to be dismissed for some reason or had never been
17 filed, this would still be out here as an issue. It would
18 be resolved in the state court where the matter was
19 originally filed. I don't think anyone's disputing the fact
20 that this is a state law issue.

21 THE COURT: Well, the Debtors contend -- and if
22 they're right on the facts, I think they're right on the
23 law, that to get there, you have to make it -- I'll have to
24 conclude that it is a real issue, a difficult issue of state
25 law. There has to be a limit, in other words, to the

1 argument that a non-debtor third party doesn't have to turn
2 over property, doesn't have to perform an agreement or
3 otherwise exercise control over property of the estate and
4 force a debtor to go pursue its rights in some other forum.

5 MR. GENSBURG: Actually, Your Honor, I think in
6 the way you framed it, you jumped a couple of steps forward
7 because that's not what it is. The question here is whether
8 Sears complied with the terms of the Illinois EDA Act.

9 THE COURT: I know, but if the -- I'm not -- I
10 don't have a view on this yet. But if the answer to that is
11 yes, clearly, this is a no-brainer, then it really isn't an
12 issue guided by state law because it's not an issue.

13 MR. GENSBURG: Well, right. And it's sort of --
14 it gets a little circular here.

15 THE COURT: Well, it doesn't because Congress
16 clearly did not mean that any party to which a debtor has
17 some dispute with can force the debtor to pursue it
18 notwithstanding the automatic stay, notwithstanding 542 in a
19 state court where it's perfectly clear that there really
20 isn't a dispute. There's no real dispute.

21 MR. GENSBURG: Your Honor, on that point, I guess
22 you and I are not going to disagree.

23 THE COURT: Okay.

24 MR. GENSBURG: Because clearly what you're talking
25 about is 542. And we all know the case law under 542. 542

1 is meant to bring into property that's already undisputed
2 property of the estate.

3 THE COURT: Well, you can't just raise your hand
4 and say I dispute. It has to be a real dispute.

5 MR. GENSBURG: Oh, absolutely.

6 THE COURT: Okay.

7 MR. GENSBURG: Absolutely. And that's what the
8 cases say. You know, they use -- you know, and you look at
9 the verbiage in the cases and you see some cases say
10 frivolous. It refers to frivolous dispute and not
11 legitimate dispute, not bona fide, not substantial. And I
12 understand that. And what the Debtors can convince Your
13 Honor is that this matter is not a bona fide dispute so that
14 it is under 542, then I think it's correct and falls within
15 the confines and it is in fact a core proceeding.

16 But, you know, the Supreme Court talked about this
17 a long time ago in Northern Pipeline. In Northern Pipeline,
18 you'll recall is a breach of contract action, and the
19 contract would have augmented the estate. And what the
20 Court did is it made a clear distinction between public
21 rights which govern Article I courts and private rights.
22 And what we have here, we have a contract and we have a
23 question. You know, did Sears comply with the terms of the
24 contract or did not comply with the terms of the contract?

25 And it gets a little more complicated because

1 within that question, there's a question of, all right, what
2 year's relevant. Sears says 2017. We think it's 2018. And
3 then it gets even more complicated by saying, well, do you
4 count tenants and contractor employees or do you limit it
5 just to Sears employees. And then you add on top of that
6 the third issue is even if they're right about 2017-2018
7 issue and even if you determine that they're entitled to
8 count tenants and contractors, when you count those tenants
9 and contractors, do they meet the limit. Well, those are
10 all the issues --

11 THE COURT: I'm sorry. When you say there's a
12 factual issue, even if you count the tenants and the
13 contractors?

14 MR. GENSBURG: There is.

15 THE COURT: Okay.

16 MR. GENSBURG: There is and which drove our motion
17 to strike to a certain extent. And so I guess, Your Honor,
18 I'm not debating the fact that if you -- and that's why I
19 have Mr. Florey here. If Your Honor's going to tell me
20 that, counsel, this is as clear as day. This legislation
21 that's not the epitome of clarity is clear as day. You're a
22 loser. I can see it. That's sort of a 12(b)(6) argument.

23 In CIL, that's exactly how the court dealt with
24 it. The court dealt with this turnover issue by treating it
25 almost like a 12(b)(6) issue had they stated a plausible

1 claim.

2 THE COURT: Right.

3 MR. GENSBURG: I tried to figure out because when
4 you look at the decisions, the courts really don't explain,
5 well, how do you know --

6 THE COURT: That's a fair analogy.

7 MR. GENSBURG: And but there's other analogies
8 that even may be closer. You know, under 303 of the
9 Bankruptcy Code involuntary, if you're a petitioning
10 creditor, you have to have a (indiscernible) subject to bona
11 fide dispute. And so when Your Honor is dealing with are
12 there appropriate creditors here and one of the questions
13 you're asking I assume depending on the facts that arise, is
14 this a bona fide dispute. This is the same issue to a
15 certain extent.

16 THE COURT: No, that case law is very different
17 because of the policy against involuntaries. But go ahead.

18 MR. GENSBURG: Okay.

19 THE COURT: It's okay.

20 MR. GENSBURG: But where it gets a little -- in my
21 mind, a little unclear is -- and I get the impression Sears
22 is suggesting that you should actually resolve the dispute
23 to determine whether it's a bona fide dispute. And that I
24 think would be inappropriate. I don't think that's -- that
25 would just basically say, well, Northern Pipeline is

1 irrelevant. You need to determine, look at the facts and
2 determine whether there's really a dispute here. And if
3 there is really a dispute here and this is the only basis
4 for them having jurisdiction, then the Court must abstain,
5 assuming that we've --

6 THE COURT: Well --

7 MR. GENSBURG: -- convinced you with respect to
8 the other elements of 1334(c)(2).

9 THE COURT: Right. Okay.

10 MR. GENSBURG: So if that's where we're going and
11 whether there's a bona fide dispute and all the other
12 elements of 1334(c)(2) have been conceded, then --

13 THE COURT: Well, I'm not sure they are. Will the
14 pending Illinois action result in a timely adjudication?

15 MR. GENSBURG: I believe it will, Your Honor.
16 And so let me address that. So first of all, there's a --
17 you know, AOG Entertainment from this district dealt with
18 that issue. And basically what that court says is it stated
19 that out of deference for -- to the paramount interest of
20 another sovereign and out of respect for principles of
21 comity and federalism, "Absent contrary evidence, a federal
22 court must presume that the state court will operate
23 efficiently and effectively in adjudicating the matters
24 before it."

25 And then another case from this district,

1 (indiscernible) Capital basically says that the burden
2 should be on the Debtor to prove that the state cannot
3 adjudicate claims in a timely manner. And, Your Honor, they
4 simply have not met their burden. What the Debtors say in
5 their briefs is they say, well, Your Honor, can do it
6 faster. Well, when I go on, I'll explain why --

7 THE COURT: Just tell me what your projected
8 timeline is on this.

9 MR. GENSBURG: Right now, Your Honor -- well, I
10 guess this should be if it's a straightforward as their
11 counsel suggests and it can be sided as a matter of law and
12 not as a -- I think this could be resolved in 30 to 60 days.
13 It's already pending before the Court. They got stayed and
14 motion for injunctive relief.

15 THE COURT: By?

16 MR. GENSBURG: I'm sorry, Your Honor.

17 THE COURT: That motion by whom for injunctive
18 relief?

19 MR. GENSBURG: By the school district. And it was
20 going to be -- it was set for argument and the bankruptcy
21 got filed and they stopped it. If in fact this issue --

22 THE COURT: And I'm sorry, that's to enjoin the
23 town from paying the money over?

24 MR. GENSBURG: Yes, sir.

25 THE COURT: Okay.

1 MR. GENSBURG: And issues -- and that's basically
2 the issue, right. The issue is don't pay it if they don't
3 meet the prerequisites. The Debtors stated that this is a
4 straightforward issue. I get the impression they believe
5 that this Court can decide or any court can decide as a
6 matter of law. There's no reason to believe if that's true
7 that that's can't be decided in 30 to 60 days in Illinois.
8 They certainly know how to do it.

9 And the statistics that I attached to our response
10 say, you know, 81 percent of the cases, civil motions filed
11 in Cook County now are resolved in 30 days. So --

12 THE COURT: Well, I would really like something
13 more specific on this case. You know, a lot of the motions
14 filed in Cook Count involve cars. So can you or one of your
15 colleagues tell me their projection of the timeline of this
16 case? I mean obviously an injunction would not -- it would
17 give the parties a good idea what the Court believes the
18 merits -- where the merits go, but it wouldn't decide the
19 issues.

20 So I'm trying to -- I'm really trying to -- look,
21 the reason I'm saying this is this is not a two- or three-
22 year case. This is a case where the Debtors have reduced
23 their hard assets to cash. Their obligations and that cash
24 -- I'm sorry, their administrative expense obligations and
25 that cash are very close to each other, so time is really

1 important. And any extra cash is really important.

2 Now they may have all sorts of litigations claims,
3 but those won't be realized for a long time and you can't
4 use those to fund the payment of administrative expenses
5 under a plan unless the administrative expense creditors
6 consent. So resolving this case promptly is really
7 important. And I think what Congress drafted or -- yes,
8 when Congress or the Supreme Court drafted these provisions,
9 when they used the word "timely," they wanted to take --
10 they wanted the bankruptcy court to take into account the
11 effect of the state court litigation on the bankruptcy case.

12 So what is your best --

13 MR. GENSBURG: And what I'll do, Your Honor --

14 THE COURT: Just what is your best estimate and
15 why of the likely -- I understand if there's going to be a
16 trial, that's a different issue. You know, if there's going
17 to be a trial on whether even counting the third parties who
18 work at the site or worked at the site, that will take
19 months longer. But just on a motion to dismiss type of
20 standard on either the 2017 versus 2018 and/or it has to be
21 Sears as opposed to Sears past people who worked there,
22 what's your best estimate of --

23 MR. GENSBURG: Let me allow Mr. Florey --

24 THE COURT: Okay.

25 MR. FLOREY: Good morning, Judge. Ken Florey from

1 Robin Schwartz on behalf of the School District 300. Judge,
2 the state court case is still active pending the ruling from
3 this Court on the automatic stay. And Cook County is used
4 to dealing with expedited cases. There are election cases
5 that when there's a need for a quicker briefing schedule for
6 rulings and issues of the law, the courts are cooperative in
7 doing that. That's exactly what we would be doing.

8 If you give us the relief, if you abstain and
9 we're back in the state court, we'll be filing motions next
10 week. We'll get a hearing on the temporary restraining
11 order to be followed by a motion for summary judgment on the
12 issues of law. And if counsel's right, there are not many
13 disputed fact issues, we could get a ruling very quickly.
14 We would be going under expedited briefing schedule. We
15 would have it briefed. You can expect the ruling within 30
16 to 60 days.

17 THE COURT: Of the abstention or of the filing the
18 motion?

19 MR. FLOREY: From tomorrow.

20 THE COURT: Okay. And it would seem to me that
21 your client would really want the money, right? You
22 wouldn't be delaying the process knowing that there would be
23 some leverage on the Debtor if you did that?

24 MR. FLOREY: Judge, this money will be going
25 towards -- first of all, the school district is 21

1 buildings. There's --

2 THE COURT: No, I'm sorry. I didn't -- it wasn't
3 clear. Would you undertake not to delay the process?

4 MR. FLOREY: We want the money tomorrow. We need
5 the money for --

6 THE COURT: All right.

7 MR. FLOREY: -- security measures to secure our
8 schools.

9 THE COURT: So the answer to my question is yes,
10 you won't delay the process?

11 MR. FLOREY: Yes, absolutely.

12 THE COURT: Okay.

13 MR. FLOREY: The money is -- the time of this
14 money is critical.

15 THE COURT: Okay. So why don't I hear from your
16 colleague then.

17 MR. GENSBURG: On that point, Your Honor, I just
18 want to make one other point with respect to this Court. If
19 I'm right, I think I am, that this matter is related to --
20 it's clearly related to -- but it's not (indiscernible),
21 then what we ought to keep in mind is what's going to have
22 to happen. Your Honor's going to make findings of fact and
23 conclusions of law and that's got to be sent up to the
24 district court to consider.

25 The only way we avoid that is if Your Honor

1 determines that this is in fact court and I don't know how

2 --

3 THE COURT: Well, we're back to the 12(b)(6) type
4 of point.

5 MR. GENSBURG: Yes, we are.

6 THE COURT: Okay.

7 MR. GENSBURG: And so I think in summary, Your
8 Honor, with respect to 1334(c)(2), it sounds like those are
9 the only two issues. You got us into the time frame. The
10 school district, we filed this motion in November because we
11 needed the money. We still need the money even more. So we
12 have every incentive to get this done promptly.

13 And then the real question, Your Honor, is whether
14 this is -- the dispute is functionally frivolous or not bona
15 fide or -- and I wish I could find a case that actually
16 defined what does it mean not to be bona fide. And that's
17 why I went to 303 because 303 actually uses the word "bona
18 fide." And I was trying to find something similar to that
19 and you just don't find in the case law. What you find is
20 cases that say, you know, for example, one decision in which
21 they argue that they didn't owe the money and there was a
22 dispute but the Court looked at the defense, I forget what
23 it was, and it said there's no possibility under this
24 agreement that that defense has any validity at all. And
25 that's I think the Court that said it was frivolous. That's

1 not where we are.

2 And so, I guess in trying to figure out what the
3 appropriate step is at this point, if Your Honor wants, I
4 can give it back to Mr. Florey. Mr. Florey can explain to
5 you his analysis with respect to the statute, both the
6 years, you know, which year's applicable. He could explain
7 to Your Honor the school district's analysis with respect to
8 can you count tenants and contractors or not because the
9 statute's not really clear on this point. And then we can
10 deal with the issue of even if you can do all of that,
11 whether Sears up to this point has actually proven the
12 elements of the number of tenants that worked, full-time
13 equivalent tenants and number of contractors that were full-
14 time equivalent contractors because we have problems with
15 that. And that's the motion to strike.

16 So, Your Honor, you know, I guess I ask the Court
17 to suggest how you'd like us to proceed.

18 THE COURT: What is your proof on the latter
19 point? What is your evidence on the -- that the third
20 parties don't add up to the number of -- the number in the
21 EDA along with Sears?

22 MR. GENSBURG: Well, so our problem with that
23 point which led to our motion to strike is that we don't
24 know how and Mr. Meghji doesn't know how it was calculated.
25 So --

1 THE COURT: Okay. So let's say you don't need to
2 present evidence on that because you just would cross-
3 examine him.

4 MR. GENSBURG: Well --

5 THE COURT: And depose him, of course. We take
6 discovery on that.

7 MR. GENSBURG: We sent him a notice of deposition
8 and we sent Sears a 30(b)(6) notice.

9 THE COURT: Right.

10 MR. GENSBURG: And he came and we asked that
11 question and he refers to a methodology, but he didn't what
12 it was. And think about this.

13 THE COURT: So, no, I'm sorry. I understand your
14 point which is this isn't an evidentiary hearing and you
15 want to develop the record on that point.

16 MR. GENSBURG: And some of the tenants, Your
17 Honor, (indiscernible).

18 THE COURT: I'm sorry.

19 MR. GENSBURG: (Indiscernible), you know, the
20 authentic Italian --

21 THE COURT: Pizza?

22 MR. GENSBURG: Yeah.

23 THE COURT: Right.

24 MR. GENSBURG: And I would suggest it would be
25 like, you know, Walmart that very few of their employees are

1 full-time equivalent employees in that everyone's part-time
2 so you don't have to give them benefits. But I don't -- I
3 have no idea how they calculated their numbers. And I don't
4 think Mr. Meghji knows. I can guarantee you he doesn't know
5 because he didn't tell us. We asked him the question. And
6 that's an important fact assuming we even get to that point.

7 THE COURT: Right. Okay.

8 MR. GANSBURG: So, Your Honor, I guess -- would
9 you like Mr. Florey to walk you through --

10 THE COURT: Yes.

11 MR. GANSBURG: Yes.

12 MR. FLOREY: Judge, a little background on Civil
13 District 300. The school district has 21,000 students with
14 27,000 school buildings, and it is heavily reliant on
15 commercial property taxes.

16 THE COURT: But can I just interrupt you for a
17 second?

18 MR. FLOREY: Sure, Judge.

19 THE COURT: This subsidy has been going on for a
20 while, right? I mean, they had to have budgeted, I would
21 think, on the assumption that it would be paid again, right?

22 MR. FLOREY: Every year this subsidy exists, the
23 costs grow. With Illinois, there's a --

24 THE COURT: Well, of course, that's a given with
25 schools. But what I'm saying is it's not as if they built

1 into their budget getting this money. It's a windfall,
2 right?

3 MR. FLOREY: It is not a windfall, Judge.

4 THE COURT: Well, all right.

5 MR. FLOREY: It's not a windfall. They've been
6 disputing this. They've been demanding proof of compliance
7 since Sears realized it breached the agreement with the
8 state. There are two subsidy agreements in place for the
9 facility, state subsidy-based income taxes, and the local
10 subsidy based on property taxes.

11 In Illinois, school districts are heavily
12 dependent for operations on commercial property taxes. The
13 resident come in, they build houses, they create kids. Each
14 kid is roughly \$12,000. You have two kids, that's \$24,000.
15 You're going to get maybe four, five, six thousand dollars
16 on that house. You're running a deficit for every single
17 house that is built.

18 Well, since Sears came in and built their facility
19 and homes grew, our burden just kept building and building
20 for funding the education of these students. We're below
21 the state average. We're at over 40 percent property --

22 THE COURT: All right. My only point is that's
23 arguing that the statute was a mistake in the first place.
24 I don't think... It doesn't do any good with me to argue
25 that it would be nice for the school district to have the

1 money because it's a tautology. I don't think there's
2 anything as far as beyond that.

3 MR. FLOREY: But the statute does have recapture
4 provisions.

5 THE COURT: Right.

6 MR. FLOREY: And it was amended in --

7 THE COURT: That's fair. I understand that.

8 MR. FLOREY: -- in 2012.

9 THE COURT: I understand that.

10 MR. FLOREY: Remanded in 2012. There was a
11 question and a doubt about whether Sears would comply with
12 the 4,250-employee requirement.

13 THE COURT: Right.

14 MR. FLOREY: So, the recapture provision was
15 specifically -- went into both statutes, the state statute
16 and the local statute, to recover the funds. And we're at
17 that point. We're at the point that the school district has
18 been carefully monitoring since 2016. They were dropping
19 employees like flies and were at that point where they
20 dropped below the 4,250 for the state statute, and similarly
21 they dropped below the 4,250 in the local statute.

22 Now the recapture provision has kicked in. We're
23 in the position to be able to assert the recover of those
24 dollars. It's been -- it's desperately needed in the school
25 district. You're talking about employees. You've asked if

1 we budgeted for it. They're running at a deficit as far as
2 education funding for their district. This is necessary
3 money, Judge.

4 All right. If you look to the statute, you're
5 talking about what we've talked about repeatedly. What are
6 the relevant numbers, Judge? What are the relevant -- what
7 do we look to for the account for the employees?

8 Clearly, when you only count Sears employees,
9 there's -- it's undisputed, they fail on that regard. They
10 dropped below the 4,250 at least in early 2017, if not
11 earlier. So, then Sears came up with the novel argument
12 that we're going to change the year of how we're accounting.

13 The Village, in 2017, asked for a certification
14 from Sears. Are you in compliance with the jobs requirement
15 for 2017 data? They provided that answer with 2017 data.

16 In 2018, the Village submitted a similar
17 (indiscernible). Are you in compliance with the jobs count
18 for 2018, using 2018 data? Sears response was, we're going
19 to use 2017 data. We're going to count the data we want to
20 use twice, even though in that year there were all
21 indications that failed to comply with that, based on only
22 counting their own employees.

23 THE COURT: So, the first issue is the year issue?

24 MR. FLOREY: The year. Which year's data are we
25 using?

1 THE COURT: Okay.

2 MR. FLOREY: The statute talks about that. And
3 Cook County taxation, I could put you to sleep with an
4 explanation of how that works. But the critical terms are
5 levy taxes, levy new taxes paid. The statute -- the EDA Act
6 talks about using the -- to satisfy the subsidy requirement
7 of 4,250 employees, you use the data from the year the taxes
8 are paid. They didn't use the year the taxes are levied.

9 Sears' argument requires you to go back to a prior
10 year for the levy. There's no term of levy in the EDA Act,
11 only paid, and it's used multiple times, as recited in our
12 brief. So, based on that, just --

13 THE COURT: Although they say that in practice
14 that's what the parties did.

15 MR. FLOREY: No, just the opposite.

16 THE COURT: You disagree with that?

17 MR. FLOREY: Look at the documentation from the
18 Village. The Village asks for 2017, provide us 2017. For
19 2018, provide us 2018 data. Sears did it in 2017, as
20 requested. Sears started playing games and 2018 when they
21 realized they can't hit numbers. Then they decided, we'll
22 just change the year, despite the practice, despite the
23 clear language in the statute.

24 And then when that didn't work, they said, we're
25 going to change the count. We're going to now start --

1 we've never counted contractor employees; we've never
2 counted tenants. We'll even count employers that are miles
3 away from the campus. But in theory, have some economic
4 development of Sears.

5 It continues to be a stretch for Sears to try to
6 demonstrate that they complied with the statute and then the
7 recapture provisions do not kick in.

8 THE COURT: Okay.

9 MR. FLOREY: So, the 2018, in our view, the
10 statute is clear, the past practice is clear; you need to be
11 using the 2018 data, not the 2017 data. And then we get
12 into the employee count.

13 The statute talks about the developer. And the
14 developer is not tied into Sears, but it has characteristics
15 that Sears is the only company that does comply. It does
16 not talk about the developer and its contractors and its
17 third-party employers, or any other employers. None of
18 which these employers receive any tax subsidies.

19 So, to claim that you can -- the burden of them
20 and those other entities employing people without any
21 benefit of a subsidy is a ridiculous interpretation of the
22 statute.

23 The statute talks about the development agreement.
24 It's much more specific and talks specifically about Sears
25 as the developer and having to create, retain and maintain

1 4,250 jobs.

2 Let's talk about the state statute, because it's
3 important, and these words that are in both the EDA Act, the
4 local statute and the state statute. They use create,
5 retain and maintain. Maintain is a critical word, Judge.

6 Maintain is the word used in the recapture
7 provision. If Sears doesn't maintain 4,250 jobs, it loses
8 the subsidy. Under the state statute, that's the exact term
9 that's used. And if you're going to go outside the
10 statutory language, as Sears wants you to do, and look to
11 other statutes, cardinal rule of statutory construction, you
12 look to similar statutes with similar terms to get your
13 answer. Maintain under the state statute, meant Sears
14 maintained the employees.

15 THE COURT: And what is your authority for that?

16 MR. FLOREY: The authority for just counting the
17 Sears employees?

18 THE COURT: Yeah, that maintain means employ.

19 MR. FLOREY: Because that's how Sears settled with
20 the state, saying, we did not -- Sears, as an entity alone,
21 did not maintain 4,250 employees. So, under the state
22 statute, which is the same target of employee count, similar
23 subject, the maintain is, was, and been interpreted by both
24 parties to mean Sears employees. So, that same word is used
25 --

1 THE COURT: In --

2 MR. FLOREY: -- in the (indiscernible) provision.

3 THE COURT: In what context, though?

4 MR. FLOREY: The same context.

5 THE COURT: No.

6 MR. FLOREY: The context of providing the
7 employees for the economic development.

8 THE COURT: But -- I'm not being clear. It's not
9 a judicial decision.

10 MR. FLOREY: It is not a judicial decision;
11 correct.

12 THE COURT: It is reflected in what?

13 MR. FLOREY: It's reflected in the statute, how
14 it's been interpreted by the agency that -- the Department
15 of Economic Development is a state agency created to process
16 that statute. That was the party that Sears (indiscernible)
17 was saying we did not reply with the jobs requirement. The
18 state agency's interpretation of the statute are given a
19 high amount of deference in Illinois, as in most
20 jurisdictions. The conduct of the parties using the Sears
21 employees only for the two --

22 THE COURT: As part of the settlement, though.

23 MR. FLOREY: It was a point of --

24 THE COURT: As part of the settlement?

25 MR. FLOREY: Correct.

1 THE COURT: Okay.

2 MR. FLOREY: So, when you take the word maintain
3 that's used in both statutes, clearly, you're talking about
4 Sears employees only. If the General Assembly of the
5 Illinois Legislature sought to expand Sears ability to count
6 other employers, you would have had language, express
7 language to do that. In Illinois, as within most municipal
8 jurisdictions, you must have express statutory language to
9 authorize any type of conduct you're going to engage in.

10 THE COURT: I'm sorry. The statute you're relying
11 on was enacted before or after that settlement?

12 MR. FLOREY: Prior to the settlement. They were
13 both amended in 2012 --

14 THE COURT: Okay.

15 MR. FLOREY: -- to extend Sears' state and local
16 subsidies for another 15 years.

17 THE COURT: Okay.

18 MR. FLOREY: So, you get past the 2018, 2017
19 issue. If we're correct, Sears is -- they lose. They lose.
20 They don't come in compliance. If you get to the employee
21 count issue, based on the statutory language, based on the
22 interpretation of how the state is interpreted, and most
23 importantly based on the legislative history, which we have
24 included in our documents.

25 Interesting, very critical debate of the sponsor

1 of the bill, the legislative history for our statute, before
2 the EDA Act, the question was raised. What if Sears drops
3 out its employees -- and they had the presence of mind to
4 ask this question in 2012 -- what if Sears has rough times,
5 drops out its employees, goes to a lower count, couple
6 hundred employees below the 4,250 number, and they have a
7 skeletal crew operating there? Do they still receive the
8 subsidy?

9 The sponsor of the bill said the intention of this
10 statute is no. If they drop to that level, they lose the
11 subsidy. That's a clear indication of the legislative
12 intent, do you count other employees? The sponsor could
13 have said, well, representative, you can also -- Sears is
14 going -- there's going to be other employers still. There's
15 going to be -- because it's not just a Sears campus.

16 There could be another company that comes in here
17 and starts to lease the space with thousands of employees.
18 They didn't say because its Sears as original economic
19 development, they were going to continue to proceed with the
20 subsidy, even though they're still there, still in
21 existence, still operating on the campus.

22 That's critical that the General Assembly did not
23 intend Sears to count anyone but its own employees. You
24 have the burden of the employees. That's the only way you
25 can receive the benefit of the subsidy.

1 So, based on the clear language of the EDA Act,
2 the development agreement which talks about Sears
3 maintaining the 4,250 jobs, the practice of the parties, the
4 legislative history, it's clear that only Sears employees
5 are counted, for the same reasons it's clear that the year
6 taxes are paid is the applicable year.

7 And if you get through all those levels, if you
8 still disagree with us, as counsel said, they have no idea
9 whether the numbers that they've presented, the documents
10 they've presented as contractor employees, tenant employees,
11 are liable numbers. They haven't even provided a list of
12 the names of the tenants, the names of the contractors.
13 It's just a term on their spreadsheet. They didn't -- it'd
14 be very simple to say these are our tenants, Sbarro, dry
15 cleaners, Dunkin' Donuts --

16 THE COURT: Right. And --

17 MR. FLOREY: -- whoever they are.

18 THE COURT: And the argument being made is that
19 Mr. Meghji wasn't fully informed so he couldn't
20 (indiscernible) there would be a sixth witness on that
21 issue.

22 MR. FLOREY: He didn't even need to -- they just
23 need to produce documentation, give us a -- I'm assuming
24 they have leases. Give us copies of the lease, give us a
25 list of the leases and the parties. Who are your

1 contractors? Who are you counting? Who are the businesses?

2 If you can't even provide the names of the
3 tenants, the names of the contractors, the names of these
4 other entities, how can you count for employees?

5 If you can't explain why we've -- and the term,
6 the second (indiscernible) Misty Redman, she said -- she
7 testified that the document they were relying on, Exhibit
8 13, hasn't been scrubbed. She called it scrubbed. No one
9 has gone through and removed part-time employees.

10 So, they're relying on an unscrubbed -- using
11 their terminology -- document to attempt to demonstrate to
12 this Court that you get through all others hoops about can
13 we count these obscure employees that we have no identity --
14 we don't identify the employers, we don't identify the
15 employees, where they're only verifying whether they're
16 full-time or part-time or anytime.

17 Any way you look at this, Judge, there is no basis
18 in fact or law to grant their motion to compel. To the
19 contrary, the arguments that we raise in opposition to that,
20 as well as the demonstration of the bona fide dispute, it's
21 pretty clear that exists, as counsel has argued. And I'll
22 leave the rest to the abstention argument.

23 THE COURT: Okay. Thanks.

24 MR. GANSBURG: Your Honor, at this stage, I think
25 it's probably appropriate, unless you have more questions

1 for me, to hand it over to Mr. Friedmann.

2 THE COURT: Okay. That's fine.

3 MR. FRIEDMANN: Your Honor, Jared Friedmann, Weil
4 Gotschal & Manges, on behalf of the Debtors. All right. I'm
5 not even sure where to start.

6 Okay. So, beginning with the fact that for a
7 mandatory abstention, all of our requirements need to be
8 addressed and they need to be met by the movant seeking
9 abstention here.

10 The issues here are clearly fundamental core
11 issues. We're talking about property of the estate. Now,
12 there --

13 THE COURT: Well, no, it hasn't been decided yet -

14 -

15 MR. FRIEDMANN: Well --

16 THE COURT: -- that they can't be released.

17 MR. FRIEDMANN: -- the Illinois action that they
18 want to pursue -- so this is a motion for -- it was a motion
19 for stay and also a motion for abstention, so the issues are
20 a little bit conflated.

21 But the -- when he's talking about the injunction
22 that's been filed and the complaint that's been filed, it
23 doesn't just involve the amounts in our motion for turnover,
24 which are the 2017 funds. It also seeks to recoup funds
25 that were paid in 2016 and 2015, and I don't know how many

1 years back.

2 So, it's both the funds that have not yet been
3 paid by the EDA, because they're sitting there right now,
4 and the EDA is waiting to pay them to us. It includes funds
5 that we already were paid, which they'd really, even if they
6 were successful, not have -- just an unsecured claim, I
7 guess. And it also seeks to seek a declaration going
8 forward for claims that aren't yet ripe in 2018, 2019 and so
9 on.

10 THE COURT: Well, that --

11 MR. FRIEDMANN: It's a lot broader than --

12 THE COURT: You're not going to be covering 2019,
13 are you?

14 MR. FRIEDMANN: Are we covering 2019 --

15 THE COURT: I mean --

16 MR. FRIEDMANN: Well, that's why we've moved on a
17 very narrow issue, Your Honor.

18 THE COURT: Right.

19 MR. FRIEDMANN: Which is that right now, there are
20 funds being held by the EDA for 2017, which we want to be
21 turned over. That's the only thing we're moving on right
22 now (indiscernible) has the right.

23 THE COURT: But the abstention is only as to the
24 turnover motion, right? It's not -- the rest of it would be
25 stayed, right?

1 MR. FRIEDMANN: I don't that's accurate. I think
2 that the abstention motion was filed before we even moved
3 for turnover. The --

4 THE COURT: Well --

5 MR. FRIEDMANN: The first filing here was a --

6 THE COURT: Well, let's clarify that. I mean, I
7 understand the point about the money that's sitting with the
8 Town, but I mean, there's... What's the action requesting?

9 MR. GANSBURG: Well, Your Honor -- and you
10 probably saw it in our brief. We offered a compromise on
11 this point. All we need to know is determine whether Sears
12 has complied with the terms of the EDA Act. Has it the
13 4,250 employees, which --

14 THE COURT: Well --

15 MR. GANSBURG: -- picks up the other two issues?
16 And then, which would make sense, when did -- if it didn't
17 comply or fell out of compliance, when did it fall out of
18 compliance? That's it.

19 THE COURT: Well, that's a --

20 MR. GANSBURG: That --

21 THE COURT: That's not...

22 MR. GANSBURG: It seems... The only reason why I
23 added that second part, Your Honor, because it seems
24 efficient.

25 THE COURT: Well --

1 MR. GANSBURG: But if the Court --

2 THE COURT: That's not mandatory of the statute.

3 MR. GANSBURG: Right. Well, it would still fall
4 under the mandatory of the statute, but not withstanding
5 that --

6 THE COURT: It's not efficient because you've been
7 litigating issues that might -- your client might get, you
8 know, five cents on the dollar on -- six years from now.
9 So, it's not efficient.

10 MR. GANSBURG: Well --

11 THE COURT: It would be efficient to decide the
12 core legal issues, which would then be a matter of
13 collateral estoppel on the claim. And of course, then you
14 have the mandatory abstention issue for money that's being
15 held.

16 MR. GANSBURG: And we'll go and look at that, Your
17 Honor.

18 THE COURT: Okay.

19 MR. GANSBURG: And so, just have these matters
20 resolved and then we'll come back to the Court and we can
21 discuss through other pleadings what's the consequences of
22 all that.

23 THE COURT: Okay.

24 MR. FRIEDMANN: All right. So, the second issue
25 that we had discussed was timing, and you asked what, I

1 guess, what they guess is how long it would take? I don't
2 know if anybody knows the answer to that. I started hearing
3 about injunctions and summary judgment motions, and I'm sure
4 that discovery would be taken in advance of all of that.

5 And based on the way in which it's been litigated
6 in this court, I have absolutely no doubt that if we prevail
7 in Illinois, there would then be appeals. So, the notion of
8 30 to 60 days --

9 THE COURT: Well, there'd be appeals --

10 MR. FRIEDMANN: There would be --

11 THE COURT: -- by me too.

12 MR. FRIEDMANN: -- appeals here as well. That's
13 fine. But the notion that Illinois is a place for this can
14 be timely adjudicated, I don't know that there's any basis
15 for that at all, especially --

16 THE COURT: Well, is there a -- do you have anyone
17 to represent to me how long you think it would take in
18 Illinois, including the appellate process?

19 MR. FRIEDMANN: I don't. But the burden is on
20 them to prove to you that in fact it would be timely
21 adjudicated there. What I can --

22 THE COURT: Well, I have an Illinois lawyer
23 telling me, so, you know, I need some response, I think.
24 That's generally how I deal with this is like the lawyers,
25 since it's their area of expertise, they know their court,

1 you know? How long does it take?

2 MR. FRIEDMANN: I know from one colleague who
3 advised me with a matter she had an Cook County that in two
4 years they have not even gotten to summary judgment. So, my
5 guess is that it depends on the type of case, and the nature
6 of the case, and all of that.

7 THE COURT: Okay.

8 MR. FRIEDMANN: But I don't know that I'd be
9 asking this Court to put a lot of weight on either of those
10 predictions in terms of what this will take. I'm just
11 certain that -- whereas what I can predict is that because
12 the motion for turnover is up for an evidentiary hearing
13 today, we can hopefully have that resolved in the next
14 couple of hours, which will be much more efficient and much
15 more quick for the estate, than starting to go in Illinois.

16 THE COURT: It's not teed for an evidentiary
17 hearing today. I have not budgeted time with another 10
18 more items that are contested on the agenda to have an
19 evidentiary hearing today.

20 MR. FRIEDMANN: Okay.

21 THE COURT: Particularly with a motion to strike
22 Mr. Meghji's declaration because he wasn't sufficiently
23 prepared under 30(b)(6).

24 MR. FRIEDMANN: We're happy to address that as
25 well.

1 THE COURT: Okay.

2 MR. FRIEDMANN: The other factor is that I believe
3 Mr. Gansburg said that there's no dispute that this is an
4 issue of state law. And there is a dispute regarding that
5 because it's actually not a state-specific law. It's
6 actually a debtor-specific law.

7 The EDA act -- not the Edge Act, which they kept
8 referring to -- the EDA Act is an act drafted by Sears for
9 Sears. That's it. It only affects Sears. There is no
10 other company who's affected by it. It's not an issue that
11 the Illinois state courts have issued many opinions on over
12 the years. It's never been heard by any court anywhere.
13 And it only affects one party, which is the one that's
14 before your court here as the Debtor.

15 THE COURT: I guess I didn't really understand
16 that argument because even if it were, as you say, a Sears-
17 specific statute, it's still governed by Illinois law.

18 MR. FRIEDMANN: That's correct.

19 THE COURT: And it's not like Sears is not a
20 department of the U.S. that's governed by federal law.
21 We're not in the Court of Claims. But in any event, if we
22 were, it wouldn't be a bankruptcy. It wouldn't be
23 bankruptcy jurisdiction. It would be federal jurisdiction.

24 MR. FRIEDMANN: That's correct, Your Honor.

25 THE COURT: Okay.

1 MR. FRIEDMANN: The point really being that there
2 is no -- there's nothing specific about this act --

3 THE COURT: But that's a point for discretionary
4 abstention, not mandatory abstention, I think.

5 MR. FRIEDMANN: That's correct.

6 THE COURT: Okay.

7 MR. FRIEDMANN: So, also getting back to where we
8 are in the relative cases in terms of timing, so the -- a
9 case was in fact filed on the eve of bankruptcy by the
10 school district, just a couple days later. As of this date,
11 nothing's happened. It hasn't even been -- hasn't been a
12 responsive pleading filed in that case.

13 So, in terms of where the efficiency is and where
14 things are going to happen most quickly, under mandatory
15 abstention, I don't know there is evidence before this Court
16 that it's going to be timely adjudicated in Illinois,
17 certainly compared to -- even if there's no evidentiary
18 hearing today, if there's an evidentiary hearing at the next
19 omnibus hearing, or sometime before then, we've already had
20 documents produced here. We've already responded to
21 interrogatories. There's been depositions of two witnesses
22 in their individual capacity. There's been a 30(b)(6)
23 deposition. There have been discovery disputes.

24 All this stuff would have to happen all over again
25 in Illinois.

1 THE COURT: Why would it? Wouldn't the parties
2 use the same discovery?

3 MR. FRIEDMANN: My understanding is that my --

4 THE COURT: They're nodding yes over there.

5 MR. FRIEDMANN: Well, my understanding is that my
6 friends here have not been very happy with any of the
7 discovery so far here and --

8 THE COURT: Well, that's different issue.

9 MR. FRIEDMANN: -- would start all over again.

10 THE COURT: I mean, they would raise that issue
11 with me too. But --

12 MR. FRIEDMANN: They can, but --

13 THE COURT: -- in terms of the discovery that's
14 actually been had, you would start all over again, right?
15 No. And you should say that louder so the record reflects
16 it.

17 MR. FRIEDMANN: We're not going to waste legal
18 fees repeating ourselves and our school district --

19 THE COURT: Okay. All right.

20 MR. FRIEDMANN: That -- well --

21 THE COURT: And I'm seeing you're raising your
22 rights as to whether it was responsive discovery, but you're
23 not going to start it all over again.

24 MR. FRIEDMANN: We (indiscernible). Your Honor,
25 we'll move to permissive abstention as well. And I don't

1 know if I'm addressing --

2 THE COURT: No, I just want to focus on mandatory

3 --

4 MR. FRIEDMANN: Okay, sure.

5 THE COURT: -- at this point.

6 MR. FRIEDMANN: Yeah, I think from our perspective
7 is there's nothing there we've required -- unless they have
8 put in front of you evidence that this is going to proceed
9 more efficiently in Illinois, which they have not, other
10 than --

11 THE COURT: I don't think that's the standard. It
12 says timely adjudicated. Now, I do take into account the
13 pressures in the particular bankruptcy case. But -- and I
14 can always revisit it. I mean, I can estimate the -- there
15 are things I could do in this case if it turns out that the
16 Illinois court, for whatever reason, just sits on this.

17 MR. FRIEDMANN: The issue we have --

18 THE COURT: But it's --

19 MR. FRIEDMANN: -- is that right now there are
20 about \$9.6 million sitting in an account with the Village
21 that should have been paid out to us --

22 THE COURT: Well, can I --

23 MR. FRIEDMANN: -- by the end of 2018.

24 THE COURT: Could I stop you on that point?

25 MR. FRIEDMANN: Yeah.

1 THE COURT: Is that \$9.6, is that -- would that
2 all go to this school district?

3 MR. FRIEDMANN: Not -- no, absolutely not. It's -
4 -

5 THE COURT: Well, why doesn't -- they're the only
6 ones who raised this issue. Why doesn't the rest of it go
7 out?

8 MR. FRIEDMANN: I don't think anybody else wants
9 to raise the arguments that they raised because there is no
10 merit to them.

11 THE COURT: Then I don't understand why the rest
12 of it doesn't go out.

13 MR. FRIEDMANN: Oh, no, it's -- let me back up.
14 We were before Your Honor back in February, I believe, when
15 there was 100 percent of the EDA fund was there. Sixty-five
16 percent of it goes to Sears -- I'm messing the numbers up --
17 55 percent goes to Sears, 45 percent goes to a bunch of
18 other municipalities, including the school district.

19 THE COURT: Right.

20 MR. FRIEDMANN: At Your Honor's -- I don't want to
21 say insistence, but suggestion, we went back afterwards and
22 reached a stipulation so that the children that we heard
23 about who need security and the budget that (indiscernible)
24 would not be held up by this dispute, and we stipulated to
25 the distribution of that 45 percent to the municipality,

1 including the school. They've had that money since, I
2 believe, January.

3 The only portion of the EDA funds we're talking
4 about right now are the 55 percent that are earmarked for
5 Sears.

6 THE COURT: Okay. I don't think my question was
7 clear. That money you say should go to Sears, as I read the
8 statute there is more than one -- if it doesn't go to Sears,
9 there's more than one recipient of it. My question is -- I
10 gathered from the answer I got that 65 percent of that would
11 go to this school district, or approximately that amount.
12 The rest should go to Sears. No one else is asking for
13 that, right?

14 MR. FRIEDMANN: I think that's probably right,
15 Your Honor.

16 THE COURT: So, that should happen. I don't see
17 why it shouldn't. I don't understand why that doesn't
18 happen. The school district. It's not fighting for anyone
19 else. It's just the school district.

20 MR. FRIEDMANN: We made that offer
21 (indiscernible).

22 THE COURT: So, that should definitely happen.

23 MR. FRIEDMANN: And Your Honor, I'm reminded by my
24 colleague that the Village actually does have an attorney
25 here today, the Village, on behalf of the Village. So, in

1 terms of why things have or not have happened by the
2 Village, I probably should not be responding on their
3 behalf. And if you have questions --

4 THE COURT: Okay. Well --

5 MR. FRIEDMANN: -- it would probably make sense
6 for them to respond to those.

7 THE COURT: All right. Well, maybe they want to
8 just see who else got involved. But at this point, no one
9 else has gotten involved. So, it seems to me the rest of
10 the money, the money that's not... I mean, before I deal
11 with anything else, the rest of the money that's not,
12 depending on your point of view, going to go to the Village
13 -- I'm sorry -- going to go the school district, should be
14 paid by the Village or the Town to Sears. Which is --

15 MR. FRIEDMANN: Agreed.

16 THE COURT: -- I think, 35 percent, or roughly.

17 MR. SCHEIN: Your Honor, Michael Schein, Vedder
18 Price, on behalf of the Village of Hoffman Estates. One
19 clarification there. The way the statute works, if any
20 portion of the 55 percent is recaptured, that money -- the
21 money that doesn't go (indiscernible) -- of that 55 percent,
22 the way the recapture works is the Village would share in
23 some of the money that didn't otherwise go on that 55
24 percent, whereas the Village gets none of the 45 percent
25 under the statute.

1 So, the question becomes, assuming the parties can
2 all agree on what that number is, as long as we get an order
3 that's clear as to where that money goes, the Village will--

4 THE COURT: So, the Village is --

5 MR. SCHEIN: -- take the Court's direction.

6 THE COURT: -- reserving its rights to share
7 something?

8 MR. SCHEIN: Well, we would have -- that's the way
9 the statute's written. So, we have to follow the statutes.

10 THE COURT: I didn't really see that, but okay.

11 MR. SCHEIN: That's how it works, because the
12 statute, if you look at 4(g)4(a) --

13 THE COURT: How do you determine that? The
14 Village has some sort of percentage of the --

15 MR. SCHEIN: Yeah --

16 THE COURT: school district

17 MR. SCHEIN: Well, if you look at 4(g)4(a),
18 besides the 55 and 45 percent, there's another \$5 million
19 that goes off the top and it comes to the Village. And then
20 there's a bucket for costs. So, the 40 --

21 THE COURT: Is that we're talking about bucket?

22 MR. SCHEIN: No, we're not. But what happens is
23 the way the statute's written, if any of the Sears money is
24 recaptured, as the district's arguing, then Sears at that --
25 I'm sorry -- then the Village at that point shares. I don't

1 know offhand what that calculation is. I just want the
2 Court to be clear about that.

3 THE COURT: Okay. Well, you could make that
4 calculation, though, right?

5 MR. SCHEIN: Yes. We could do it all, as long as
6 we get a direction from this Court to do so, we will do it.

7 THE COURT: All right. Well, I think you should
8 do that.

9 MR. SCHEIN: We will, Your Honor.

10 THE COURT: Obviously, if there's a dispute about
11 it, I'll hear it. But I mean, no one else is interested in
12 this except you two, the school district and the Village.

13 MR. SCHEIN: Correct, Your Honor. Actually, this
14 dispute is with them. We at the Village are just waiting
15 for your Judge to direct this.

16 THE COURT: Well, no, you just told me that you
17 want some of it.

18 MR. SCHEIN: Well, all we're saying is at some
19 point, some of it may come back. It's not a question of
20 want. It's what the statute says.

21 THE COURT: Well, but no one else has asked for
22 it.

23 MR. SCHEIN: Correct.

24 THE COURT: You're asking for it.

25 MR. SCHEIN: I'm just reserving -- I'm just

1 clarifying on the record that to the extent --

2 THE COURT: Okay.

3 MR. SCHEIN: -- we are entitled to a piece of it,
4 I want the Court aware of that. That's all.

5 THE COURT: All right. So your rights are
6 preserved. You're reserving your rights. But I really
7 believe that the remaining money should go to Sears.

8 MR. SCHEIN: And Your Honor...

9 THE COURT: So can we pre-- I don't want to focus
10 on permissive extension for the moment -- abstention for the
11 moment. I want to focus on mandatory. What -- I didn't, as
12 you can tell, I didn't accept the argument that this is a
13 Sears specific statute and therefore it's somehow core,
14 right? I don't really accept the notion that turnover is
15 core unless, again, it's a no brainer.

16 MR. FRIEDMANN: Well, that adds, I think -- that's
17 our other point, though, Your Honor, is I think it is a no-
18 brainer. I think that you've got a lot of very -- they've
19 got a wonderful team here who've come up with some really
20 creative arguments, none of it is really supported, though,
21 by the statute. So the Recapture Provision 4.5 it just
22 simply says that if we don't have the 4,250 employees during
23 the relevant year that -- it doesn't say that -- what that
24 relevant year is. It doesn't say that it's the year in
25 which the taxes were levied versus the year in which the

1 taxes were paid. That's something that they have read into
2 it, because it would be better for them if it was the year
3 in which the taxes were paid because then it -- we wouldn't
4 be eligible for it quite yet.

5 THE COURT: Well, why aren't you also reading into
6 it?

7 MR. FRIEDMANN: What we're doing is we are
8 treating it the same way it's been treated year, after year,
9 after year by the Village and Sears with nobody ever raising
10 an issue. So every year, what happens is the taxes are
11 levied and, you know, so in this instance they were levied
12 in 2017, those taxes -- and they're paid in arrears. So in
13 the early part and middle part of 2018 they're paid for 2017
14 and typically by December. And in the record we've got --
15 showing both in the last two years this has happened, so by
16 December of 2018 there would have been a board meeting and
17 resolution of the Village to make that payment and
18 distribute that payment.

19 So what does that tell us about what year is
20 relevant? Well, if the Recapture Provision allows you to
21 withhold payments in any month in which we were not in
22 compliance, if they're meeting in December 2018 regarding
23 2017, they can make a decision about every month in 2017.
24 What they can't do in December of 2018 is make a decision
25 about every month in 2018, and that's the way it's worked

1 every single year going back as far as we've seen records
2 for. Is that it's that following year after collecting the
3 funds, they go back and say, was Sears in compliance? They
4 were, then the Village authorizes the payment to be made,
5 often enough in that same year, in that same year which the
6 taxes were collected, the taxes are reimbursement is paid,
7 so the course of dealing between the parties.

8 We also, again, we have Mr. Schein here from the
9 Village who can confirm our understanding and the
10 understanding between the only two parties to this
11 agreement, which are Sears and the Village. And the Village
12 does not disagree with any -- I mean, the Village, as you
13 saw, did not file any kind of objection to our motion to
14 turn over funds that they're holding, even though, frankly
15 if we're wrong it's to the Village's benefit because that
16 money goes, amongst all the municipalities, they're one of
17 them. But they didn't file any response because they would
18 have been saying something that's not accurate.

19 They don't challenge our compliance in 2017. They
20 don't challenge that 2017 is the right year to be looking at
21 for these funds, the year in which the taxes were levied.
22 They don't challenge that the way in which the employees
23 were counted was appropriate, which employees in terms of
24 what --

25 THE COURT: Well, you say "they" you're referring

1 to the Village?

2 MR. FRIEDMANN: The Villages.

3 THE COURT: Right.

4 MR. FRIEDMANN: Excuse me. Sorry. To be more
5 specific.

6 So I don't think there really is a genuine dispute
7 here at all. You have an opportunistic school district who,
8 in addition to getting the 45 percent we already agreed to
9 make sure that that was distributed to them and was not held
10 up by their own litigation, they have that money, now
11 they're looking for, as Your Honor put it, a windfall. This
12 is above and beyond what they could have reasonable have
13 expected to get when they put their budget together, and
14 they're taking a shot at it. And, you know they're lawyers
15 and that's the way lawyers make money, so I get it. But
16 there really is no legitimate basis in the case law, other
17 than their creative lawyering.

18 Let me address one final thing on that is, you
19 know, they suggest that the record is not clear and Mr.
20 Meghji's deposition, he wasn't prepared for. This is the
21 reality of being in bankruptcy, Your Honor, is that all the
22 employees who worked there in 2017 unfortunately are no
23 longer all employed by Sears. So the two women who were
24 responsible for contemporaneously keeping track, on a
25 monthly basis, of our compliance with the EDA Act are not

1 there anymore. Luckily all of their documents and records
2 are, so Mr. Meghji, as CFO -- CRO of the company, excuse me,
3 gathered all those documents, went through them and was able
4 to see that consistent with what Sears confirmed to the
5 Village, in real-time, it was in compliance in every month
6 in 2017.

7 So what has been produced and what Mr. Meghji was
8 able to testify is the best available evidence and it's
9 un rebutted. There's not -- it's not as those there's some
10 email that says, oh no, we're really not in compliance, what
11 are we going to do. There, by the way, certain are email
12 that say, we better be careful, we're learning -- we're
13 losing a lot of employees, we've got to track this carefully
14 because in the future we may not be in compliance. But
15 there is no evidence whatsoever suggesting that at any point
16 in 2017 they were not in compliance.

17 And really, at the end of the day, it's a counting
18 exercise. This is not a complicated issue. You count from
19 1 to 4,250 and when you hit that number you can stop because
20 you're in compliance. You certify that to the Village and
21 the Village turns over the money.

22 THE COURT: And that's with actual Sears
23 employees, not third parties?

24 MR. FRIEDMANN: So, it depends on the timing. So
25 in 2017, certainly the beginning of 2017, they were relying

1 solely on Sears employees at the Hoffman Estates campus.
2 And the numbers were significantly above 4,250 so as long as
3 they knew -- and then the actual number didn't matter, they
4 didn't have to certify that to the Village, they had to
5 certify that we are above the number. So there were enough
6 employees, full-time employees at Sears at the time, they
7 were fine. As the year went on and as they started getting
8 closer to that number, they started including, and there's
9 nothing in the EDA Act that prevents them from doing so,
10 they included other full-time employees that were also at
11 the Hoffman Estates campus, and that includes the --

12 THE COURT: Employees of Sears?

13 MR. FRIEDMANN: They're not employees of Sears,
14 they're employees who work at the EDA.

15 THE COURT: All right.

16 MR. FRIEDMANN: Which again, the -- there was
17 discussion about the Edge Act and the EDA Act --

18 THE COURT: And this was in 2017?

19 MR. FRIEDMANN: This was for 2017. So in 2012 it
20 wasn't just -- the EDA Act and the Edge Act were both
21 amended. Same piece of legislation, amended them both. In
22 the Edge Act the language was they required Sears to "employ
23 a minimum of 4,250 full-time employees at its corporate
24 headquarters in Illinois at the time of the application."
25 Employ. In the EDA Act, amended at the same time, same

1 legislation, uses very different language it says, "Sears is
2 required to maintain 4,250 jobs," they don't have that same
3 language "employed" because there never was an understanding
4 or a requirement that Sears employ all those people. The
5 idea was Sears came out of the Hoffman Estates, which at the
6 time was Prairieland, put \$100 million or so into that area
7 and now they're being reimbursed for that. Not just because
8 it created Sears jobs, but it created jobs for probably a
9 lot of the parents of the kids that lived in -- live in the
10 Hoffman Estates area, whether or not they work for Sears or
11 work for some other company that, you know, was spurned by
12 the fact that Sears had moved there.

13 So there is not that requirement. And once again,
14 as the Village can confirm, there's no dispute, as between
15 Sears and the Village, that it's not limited to just Sears
16 employees. In fact, it's not only limited to Hoffman
17 Estates. You could count employees in the entire EDA, and
18 Sears never did that, because it wasn't necessary. Once
19 they got to 4,250 they stopped counting. If it was
20 necessary to count through the entire EDA, they could have
21 done that they would have been even that much more over the
22 threshold.

23 But our view, Your Honor, is that there's no real
24 bona fide dispute here because neither the statute has the
25 language that the school district wishes it had, and in

1 terms of the numbers, they're there, they are what they are.

2 And it was counted contemporaneously, they're in business

3 records and it -- and Sears --

4 THE COURT: Well, the numbers for the Sears

5 employees.

6 MR. FRIEDMANN: Well, the numbers are in there for

7 both Sears employees and they also kept track of the non-

8 Sears employees. They're all working at the Hoffman Estate

9 campus, so all these employees had to get registered badges

10 through the, what was it, real estate office, at Hoffman

11 Estates. So Sears actually was able to easily keep track of

12 every -- all of the employees at the building, not just

13 Sears.

14 THE COURT: What about the school district's

15 argument that it shouldn't count part-time employees?

16 MR. FRIEDMANN: They did not count part-time

17 employees. That's actually -- the documents that were

18 produced reflect they were only counting full-time

19 employees. Now, by the way, I know the Village takes the

20 position that part-time employees could have been counted,

21 there's nothing that restricts Sears from doing so under the

22 EDA. Because they were using information from the Edge Act

23 that they had already collected, which had more restrictions

24 on it, they limited themselves to only counting full-time

25 employees. And the materials, the term "scrub" that was

1 used before, that was one of the things that was done, is
2 they would scrub it to make sure that they were only
3 including full-time employees.

4 THE COURT: Okay.

5 MR. FRIEDMANN: Thank you, Your Honor.

6 MR. GENSBURG: Your Honor, may I address just a
7 couple matter? I think this dialogue that I -- we've had
8 sort of establishes that this is simply not a statute that's
9 going to need clarity, as I said earlier.

10 But I want to point out a couple things. First of
11 all, Mr. Friedmann mentions past practices. You might
12 recall we had sent a letter to the Court about our ability
13 to get documentation from prior years and they objected
14 saying that 2017 was the only year that's relevant. And now
15 he's arguing about years' prior past practices. We've never
16 been given those documents, we've asked for that stuff,
17 haven't been given it and so I don't think it's appropriate
18 that he makes that argument right now.

19 He makes a point about how the Village's silence
20 is somehow acquiescence. I'm not sure how you read that
21 into it. You know, we've been active on this, and the
22 Village has been watching us and they know what's going on.
23 So their silence may be, you know, guys go for it, we're
24 supporting you. I don't know what it is. Or it could be
25 the fact that the Village gets -- as long as the EDA Act

1 remains in effect gets \$5 million. And then once the Act
2 disappears, because it's noncompliant, that \$5 million goes
3 away. So it could be one of those two things, or maybe it's
4 a third, I don't know.

5 THE COURT: Where does it go?

6 MR. GENSBURG: It goes to the other taxing
7 districts. The \$5 million is their take under the EDA Act
8 while its in place. And that's -- you know, if you were a
9 cynic you would say, well, that's why the Village is not
10 doing anything about this. Or maybe they're looking at me
11 and saying, go for it, Gensburg. I don't know. But I think
12 the mere fact that they're silent is not necessarily
13 acquiescence and agreement.

14 Mr. Friedmann says that there's a -- that there
15 was -- there's no --

16 THE COURT: Well, there's no -- isn't there -- I
17 mean, Sears had to certify compliance, there's no document
18 where they accept certification?

19 MR. GENSBURG: Sears -- when you -- in actually
20 attaching some of the documents Sears sends a certification
21 letter that basically says, we've complied.

22 THE COURT: Okay.

23 MR. GENSBURG: And the Village says, great. The
24 Village doesn't say, well, give the detail about how you
25 complied.

1 THE COURT: But is -- I guess my point is, isn't
2 saying, great, enough to mean that they've agreed?

3 MR. GENSBURG: I don't -- yeah, I don't think --
4 you know, the problem with those letters is the years. So
5 Sears -- the Village was saying, give us data in 2017 for
6 2017, 2018 for 2018 and so there's that discrepancy. But I
7 think, quite frankly, Your Honor, that the Village would be
8 thrilled to allow the EDA Act to remain in place because
9 they make money off of it. And that's the \$5 million. I
10 don't know if that's what Michael Schein was talking about,
11 but that's the \$5 million. Once the Act disappears, that \$5
12 million goes to all the taxing districts, it's not funds
13 that are just to the Village, which is a product of the
14 statute that Mr. Florey or Mr. Atkinson can walk the Court
15 through, if you want a little more detail on that.

16 And the problem with the 30(b)(6), you know, he
17 says, Mr. Meghji, all the employees are gone. Well, you
18 know, 30(b)(6) is hard, it requires you to inform yourself.
19 And when you look at the case law that deals with 30(b)(6),
20 you can call them employees or nonemployees, you just have
21 to inform yourself. And most of these employees are at
22 least employees under the agreement. I'm not sure why this
23 is so difficult. But the bottom line is, just saying there
24 was a methodology, and I can't tell you what it is, doesn't
25 inform me. I have no idea how you determine that the people

1 at Sbarro's who make the pizza for lunch are full-time
2 employees.

3 The other problem is, is that when you look at the
4 documentation that was provided in his declaration, Your
5 Honor, they refer to active badges for the Sears employees.
6 But there's also a column that says "daily swipes of
7 associates," which is employees. It's half that number. So
8 there's active badges of 4,300 and the daily swipes are
9 2,100. And we asked him about that and he says, I don't
10 know, I didn't look at that.

11 The fact that there's a lot of active badges and
12 the company is shrinking dramatically doesn't necessarily
13 mean there's 4,300 full-time equivalent employees, the point
14 being there's a lot at issue here that needs to be resolved.
15 This is not a frivolous dispute, by any stretch of the
16 imagination.

17 THE COURT: Let me ask your colleague, we talked
18 about, at the trial level -- at the appellate level, what is
19 your sense of getting -- let's assume there is contested, up
20 to at least the intermediate appellate court, what would
21 that time take?

22 MAN: Well, there's also an expedited proceeding
23 in the appellate court as well.

24 THE COURT: Right. But can you just give me a
25 ball park sense?

1 MAN: Again, an election case is probably the best
2 example where there's a critical need to get the answer
3 quickly, and it can be done in less than four months. You
4 have an expedited briefing schedule, you have an expedited
5 hearing schedule. Most appellate courts don't take oral
6 argument, they just render the decision. And if the
7 direction was clear from this Court to be on -- you simply
8 have to request to be on the expedited calendar.

9 THE COURT: And that applies to matters like this?

10 MAN: If --

11 THE COURT: If the parties --

12 MAN: -- we will inform --

13 THE COURT: -- request it?

14 MAN: Not just the parties but this Court.
15 They're going to understand that this -- there's a need for
16 expedited action so that we don't hold up any element of the
17 bankruptcy case. That alone is enough to get the trial
18 court to expedite this to get the appellate court to
19 expedite it.

20 THE COURT: Okay.

21 MAN: Thank you.

22 THE COURT: All right.

23 MR. FLOREY: Your Honor, I just want to clarify a
24 few statements made on the record that the district raised.

25 First and foremost, the Village's responsibility

1 is to comply with the statute, and what's most important is
2 the district noted in its papers, the statute does not give
3 the Village any audit or certification rights. So the
4 Village is not with the power to go ahead and verify. It
5 has no authority to go ahead and verify. Prior to 2018 no
6 one disputed Sears' letters, Sears' statements, all the
7 Village did, in good faith, was, are you in compliance and
8 Sears said yes and we distributed the monies as the statute
9 directs us to do. It is only just before this case and in
10 2018 that the district, or any party, let alone this
11 district, any district has disputed.

12 As a result, the bankruptcy happened, we are
13 stayed. We came to this Court with the parties to
14 distribute the 45 percent that no one had an issue, and
15 we're here today asking this Court to make a determination,
16 or if it's going to be the state court, whoever it is, just
17 to tell us what to do with the money. It is not for us to
18 make that interpretation. You, or another judge, are
19 wearing the robes, its not for the Village.

20 As for a conflict of interest, which we take
21 personally, if any of this 55 percent comes back, it
22 actually goes to the Village. So the Village would get a
23 piece of that, but right now we don't, so saying that we're
24 in favor of the Debtors or not in favor of the Debtors, it
25 would show that we, the Village, would not -- supporting the

1 Debtors, which we're not taking a position one way or
2 another, that's why our silence is here, Your Honor.

3 And finally, the EDA Act, as we understand it,
4 just doesn't go away. What they're fighting over now is
5 4.5(b) which is the statute within a section of the EDA Act
6 dealing with Recapture. The EDA Act is still in effect,
7 we're still required to comply. There is also an EDA
8 agreement, Your Honor, and really what that agreement was is
9 when this project was developed that was the basis to fund
10 the project, with -- most of it was funded by Sears. And
11 what is being paid now is not really a subsidy, it's a
12 reimbursement of the advancement of the costs to Sears, that
13 is what the statute and the agreement is.

14 We also, probably, Your Honor, to give you a
15 heads-up, may very well be back before you at some point for
16 this year, depending how this Court or any other court
17 rules, because we have the issue of the EDA agreement is up
18 for assignment to the buyer, Transform Holdco. So we're
19 only dealing with 2017 levy and the money we're holding. We
20 are collecting and will be collecting from the Cook County
21 Treasurer this coming year's tax revenues from 2018 tax
22 levy. So we may eventually face this issue again. I just
23 want to let the Court know that.

24 THE COURT: Okay. All right. Okay. I have
25 before me a motion of Community Unit School District 300 for

1 a relief from the automatic stay, or in the alternative, for
2 abstention.

3 The motion was actually filed before there was
4 anything really, I think, to abstain from, although since
5 then the Debtors have filed, and this is on for today's
6 calendar as well, a motion for turnover of property that the
7 Debtors contend is its property that's currently being held
8 by the Village party to the EDA Agreement, the Village of
9 Hoffman Estates. And I'm applying the abstention piece of
10 the motion to that turnover motion, i.e. that it is the
11 turnover motion that I am being asked to abstain from.

12 The motion seeks abstention on both a permissive
13 and a mandatory basis. 28 USC Section 1334(c)(2) provides
14 for a mandatory abstention. "Upon timely motion of a party
15 in a proceeding based upon a state law claim or state law
16 cause of action, related to a case under Title 11, but not
17 arising under Title 11 or arising in a case under Title 11,
18 with respect to which an action could not have been
19 commenced in a court of the United States absent
20 jurisdiction under this section." The section referring,
21 generally, to Section 1334, which pertains to jurisdiction
22 of bankruptcy cases and proceedings.

23 Under those circumstances, continuing on with the
24 statute, "The district court shall abstain from hearing such
25 proceeding if an action is commenced and can be timely

1 adjudicated in a state forum of appropriate jurisdiction."

2 Under the general order of reference the issues before me is
3 to the district court.

4 Accordingly, Section 1334(c)(2) requires, requires
5 that is, abstention where the motion to abstain is timely
6 filed, the underlying proceeding is based on a state law
7 claim or cause of action, there's a lack of a federal
8 jurisdictional basis, absent bankruptcy, the action is
9 commenced in a state forum of appropriate jurisdiction, the
10 abstention will result in a timely adjudication and the
11 proceeding is noncore for purposes of 28 USC 157(b), in that
12 it would not arise under, or arise in -- arise under Title
13 11, or arise in a Title 11 bankruptcy case. See *In Re:*
14 *WorldCom, Inc. Securities Litigation*, 293 B.R. 308, 331
15 (S.D.N.Y. 2003).

16 Regarding the timely adjudication -- or subject to
17 timely adjudication requirement, there appears to be no
18 definitive standard for judging whether an action is capable
19 of timely adjudication. However, it is reasonably clear
20 that the cases that address the issue focus on the needs of
21 the Chapter 11 case and not an absolute time frame. See
22 Paragraph 3.05, *Collier*, 16th Edition, 2019, i.e., the Court
23 should not simply look at an objective argument as to
24 whether courts in the nonbankruptcy forum adjudicate their
25 cases within a certain time frame, but rather how the time

1 frame in which they adjudicate those cases relates to any
2 urgent needs of their particular Chapter 11 case where the
3 bankruptcy court -- over which the bankruptcy court is
4 presiding.

5 The only basis for bankruptcy jurisdiction here
6 that is not related to jurisdiction, but rather core
7 jurisdiction, is the the Debtor's argument that the money at
8 issue, which is being held by the Village of Hoffman
9 Estates, is clearly property of the Debtor's estate and
10 therefore must be turned over, under Section 542 of the
11 Bankruptcy Code, and that the movant school districts
12 attempt to prevent that turnover is a violation of the
13 automatic stay under Section 362(a).

14 That would clearly serve as a basis for defeating
15 the mandatory requirement under Section 1334(c)(2) if the
16 issue, indeed, were clear. I conclude, however, based on
17 the record before me, that the issues underlying the dispute
18 as to the reallocation of the funds at issue under Section 4
19 of the EDA, is not clear and would require adjudication on
20 issues that cannot be decided on a clear basis.

21 The Debtor relies heavily on the fact that the
22 recipient of the funds and the entity to whom the Debtor's
23 compliance with the EDA and its requirement that a certain
24 level of jobs be maintained for the year at issue has
25 accepted that certification. However, it is not clear to me

1 that that acceptance, which in fact is not an agreement, but
2 merely a lack of, at this point objection, qualifies as a
3 binding determination or waiver that would control here over
4 the interests of the school district, which is a residual
5 beneficiary, if in fact Sears failed to maintain 4,250 jobs
6 at the EDA for the year in question, 2017.

7 The school district argues, to the contrary, that
8 the Debtor is using figures from the wrong year, which is
9 not specified in the actual statute. And secondly, to the
10 extent its relying upon figures that include jobs that are
11 not jobs of direct Sears employees, the statute is not clear
12 on its face that that is the right method for calculation.

13 I believe that under the case law, considering 542
14 as a basis for core jurisdiction in the mandatory abstention
15 context, a Debtor needs to show more than that it has a good
16 shot at winning, or is likely to win. Rather, it needs to
17 show whether there's a bona fide basis or it is clear that
18 the Debtor will prevail. And I did not believe that the
19 Debtor's pleadings to date rise to that level of assurance
20 or lead me to rise to that level of assurance.

21 That leaves the issue, which I believe the Movant,
22 as with all of the factors in Section 1334(c)(2) as to carry
23 the burden of proof that the right to the funds being held
24 by the Village can be adjudicated on a timely basis by the
25 State Court. When I consider timeliness here, I'm very much

1 motivated by the concern that the Sears Debtors are on a
2 fairly thin margin as to the ability to pay administrative
3 expenses and, therefore, also, on a fine margin in their
4 ability without the consent of administrative expense
5 creditors to confirm with chapter 11 plan. It's important
6 for the debtors to proceed promptly to confirm a plan which
7 requires them to determine their sources and uses of cash as
8 a condition precedent to that. The Debtors have targeted an
9 outside date to do that, of July of this year, which to me
10 does not reflect wishful thinking, but rather is important
11 to do. And I believe that the money at stake here, several
12 million dollars, is an important component of that analysis.

13 So, timely adjudication, I review in that context.
14 I have been told by an active member of the Illinois Bar who
15 practices in this area, that with proper guidance from the
16 parties as well as this Court, the Illinois Trial Court, as
17 well as the Appellate Courts, would likely treat this matter
18 on an expedited basis. Counsel for the movants has
19 represented to me that under those circumstances he believes
20 there would be a final ruling on the merits of the issues
21 before me, which I briefly summarized, and which are well
22 set forth on the record within approximately 60 days of my
23 ruling on abstention, and that there is an expedited
24 procedure for appeal as well.

25 The Movants have also represented to me that they

1 would act to expedite the process and not to delay it,
2 including, for example, using discovery that has already
3 been produced in seeking expedited treatment. Based on
4 those representations I conclude that the matter can be
5 timely adjudicated, although I reserve my right to
6 reconsider my decision if it turns out to the contrary, that
7 the timeline for adjudication is not a matter of several
8 weeks, but rather several months or longer. But based upon
9 the record before me, I will abstain under Section
10 1334(c)(2). I believe there are at least colorable issues
11 going to the merits here, based on, A, the choice of year
12 for the certification and, B -- although this may never be
13 relevant, depending on the answer to issue number A, or
14 issue A, whether the statute permits the developer to
15 include in its calculations of jobs maintained, jobs of
16 workers who are not direct employees of Sears, and the
17 evidence to support that. But I believe that given those
18 colorable issues I'm required to have the State Court decide
19 those issues, again, on the conditions that the Movants have
20 agreed to on an expedited basis.

21 So, I'll ask the Movants to submit an order to
22 that effect and you don't need to formally settle that
23 order, but you should provide a copy in advance to counsel
24 for the Debtors so they can be sure it's consistent with my
25 ruling.

1 I'm not deciding today whether the stay was
2 violated. That's really an issue that will come up at the
3 end of the day. But I'm obviously permitting the underlying
4 facts to be decided by the State Court.

5 MR. FRIEDMANN: Your Honor, just a point of
6 clarification. With respect to the 40 percent that is not
7 issue, should that same order be addressing that? Do you
8 want a separate -- I know it's important to the Village to
9 have something?

10 THE COURT: No, I think there should be a separate
11 order. It's really a separate issue. I don't want to have
12 that hold up this. I just think it should proceed promptly.
13 And I also want to make it clear that what I'm abstaining on
14 is the turnover motion. The litigation should not delve
15 into the State Court litigation and decide the merits of the
16 claims that have been filed in this case for reallocation
17 for prior years, or for the future. I'm hopeful that there
18 may be clarification, based on the State Court's decision,
19 that will inform those issues on a collateral estoppel
20 basis, but the only thing that's going to the State Court is
21 the particular issue of the right to the money that's being
22 held, that would otherwise go to the school district itself,
23 by the Village.

24 MR. FRIEDMANN: And Judge, you asked earlier about
25 how do we figure out how much goes back to the other taxing

1 districts, all of a certain percent.

2 THE COURT: Right.

3 MR. FRIEDMANN: It's very easy mathematics if you
4 figure out what goes.

5 THE COURT: So, the only issue is what part the
6 Village keeps on account of your piece.

7 MR. FRIEDMANN: Whether they keep it or their
8 silence gives it to Sears.

9 MR. FLOREY: Yes, Your Honor, just for
10 clarification, we'll work with both of them. They'll do the
11 calculation the Village technically has to go through a
12 finance committee and a board committee process which we'll
13 expedite to get that completed and submit an order.

14 THE COURT: And if Sears disputes what should be
15 retained by the Village at all, I just suggest that you guys
16 leave that issue open.

17 MR. FLOREY: Thank you, Your Honor.

18 MR. FRIEDMANN: Your Honor, on the motion to
19 strike, I guess that --

20 THE COURT: It's irrelevant. It's moot.

21 MR. FRIEDMANN: Withdraw without prejudice.

22 THE COURT: Because it's not my issues.

23 MR. FRIEDMANN: Right. Thank you, Judge.

24 THE COURT: In other words, I decided this issue
25 without my consideration of Mr. (indiscernible) declaration

1 one way or the other. Okay.

2 MS. MARCUS: Good afternoon, Your Honor,
3 Jacqueline Marcus, Weil Gotshal & Manges on behalf of Sears
4 Holding Corporation, its affiliates. The next item on the
5 agenda, I believe is number five. It's the motion of the
6 Trustees of the Estate of Bernice Pauahi Bishop to compel
7 payment. As indicated on the agenda, that matter has been
8 adjourned, but Mr. LeHane would like to address the Court.

9 THE COURT: Okay. This is the Hawaiian store.

10 MR. LEHANE: That's correct, Your Honor. Robert
11 LeHane, Kelley Drye and Warren, on behalf of the Trustees of
12 the Estate of Bernice Pauahi Bishop, which does business as
13 the Kamehameha Schools. As Your Honor may recall, this
14 estate really is a school system. Ms. Bishop left all of
15 her estate to the children of Hawaii. There is a
16 significant shortfall in the rent. The rent increased in
17 July of 2018 by fourfold. And the Debtor has been paying
18 approximately 26 percent. As of April 1st, the total
19 shortfall is \$1.646 million. We agreed, at the last
20 hearing, at the request of Transform and the Debtor to
21 adjourn the matter. The Debtor did agree, in connection
22 with that adjournment, to put \$500,000 into escrow as
23 adequate protection for the rent shortfall, and we very much
24 appreciate that.

25 They, again, asked for an adjournment of this

1 hearing because, at the time they made the requests, they
2 still were not sure the treatment of the lease.
3 Subsequently, we were informed by Transform, as was the
4 Debtor that they were going to reject the lease, that the
5 store will be closing.

6 We're in the process of negotiating with Transform
7 what we believe may be a short-term lease that will allow
8 for that to be a more orderly process than closing the store
9 by the deadline to assume or reject on May 15. The Debtor
10 has agreed to add another \$250,000 to the escrow and we
11 appreciate that. That is a percentage of what would be
12 allocated to the Debtor's share of the time during which
13 they've been in the premise. From and after the closing,
14 really is the obligation of Transform and we would reserve
15 the right depending on how discussions go during the next
16 several weeks, to seek further adequate assurance from
17 Transform, which would be related to the time that they've
18 been in the premises, and base rent and tax obligations that
19 have come due since then.

20 THE COURT: Under the APA, in essence.

21 MR. LEHANE: Yeah, under the APA, that's correct,
22 Your Honor. And what we've also discussed is we're
23 adjourning this to June 20, but with the understanding that
24 we really will try to resolve this. If the parties are
25 unable to make significant progress in the next several

1 weeks, we will be submitting a scheduling order for the May
2 21, and use that as a status conference.

3 THE COURT: Okay.

4 MR. LEHANE: So, that if we have to come back here
5 before Your Honor, we would like that to be an evidentiary
6 hearing. In fact, we have folks from Hawaii ready to come
7 out for today. I obviously don't want to make that trip,
8 frankly, if we don't have to, or more than once, Your Honor.
9 So, that's essentially the update. Sorry to hear that this
10 store is going to be closing much sooner than we thought it
11 would, but we hope we can resolve this. To date, we've
12 heard no real substantive response to the issues that I
13 think were raised in our original motion. So, we thank you
14 for that, Your Honor.

15 THE COURT: Okay. Very well. Thanks.

16 MS. MARCUS: I'm glad we've picked up the pace a
17 little bit. The next item, Your Honor, is the motion of
18 Dedeaux Inland Empire Properties to compel the debtor in
19 possession to assume and assign or alternatively to reject.
20 It's Item Number Six on the agenda.

21 MR. FENNELL: Good afternoon, Your Honor, William
22 Fennell on behalf of Dedeaux and on the Empire's. Your
23 Honor, I believe that we have accomplished what they sought
24 to accomplish, which is communication with both Transform
25 Co. and the Debtor. Literally at the 11th hour last night,

1 we had a conference call and I was informed that the Debtor
2 had been informed formally that Transform Co. will seek to
3 assume its contract and, therefore, I understand that one of
4 the parties for the Debtor or for Transform Co. is willing
5 to put that on the record today. It doesn't resolve the
6 cure issue items and we're hopeful that those could be done
7 promptly and in conjunction with the master services
8 agreement for the facility, but that would be left for
9 another day.

10 THE COURT: All right. So, it is on the, it's now
11 on the assigned list.

12 MS. MARCUS: Your Honor, I believe it was on
13 Friday but it may have been on Thursday of last week, before
14 the designation rights period, and with respect to this
15 lease. We did get the notice from Transform that they are
16 designating this lease for assumption. We have not yet
17 formally -- we've kind of shared the work between transform
18 and the Debtors in terms of filing the notices with the
19 Court. And I believe that Transform's counsel is going to
20 actually file the formal notice.

21 THE COURT: So, this motion is really moot then.

22 MS. MARCUS: From our perspective it is, Your
23 Honor.

24 THE COURT: I mean, I'm not sure I would have
25 granted it, given the statute, but it's moot.

1 MS. MARCUS: I was going to make the argument, but
2 given the time, I'm not going there, Your Honor. Thank you.

3 THE COURT: Okay, very well.

4 MR. FENNELL: Is there somebody from Transform who
5 can confirm.

6 THE COURT: The counsel is here. They're not
7 disputing what you say.

8 MR. FENNELL: Your Honor, I will have to confirm
9 with their office. I'm sure, I mean we're working very
10 closely with Weil on this one but --

11 THE COURT: I accept the Debtor's representation.

12 MR. FENNELL: I do too.

13 THE COURT: They're aware of the whole process
14 here.

15 MR. FENNELL: Understood, Your Honor, but that
16 wasn't completely transparent to us, but we understand from
17 last evening and today's representations. Thank you.

18 THE COURT: Okay, very well.

19 MS. MARCUS: The next one, Your Honor, number
20 seven, is the motion of Maudlin At Butler LLC for payment of
21 administrative expenses, and their counsel will handle that.

22 THE COURT: Right.

23 MR. GOODHOUSE: Good afternoon, Your Honor.
24 Brendan Goodhouse, Cutty & Feder for Maudlin At Butler, the
25 landlord. This motion is for the payment of property taxes

1 that came due in November of 2018.

2 THE COURT: Well --

3 MR. GOODHOUSE: When --

4 THE COURT: I'm sorry, go ahead.

5 MR. GOODHOUSE: Sure. I just wanted -- some
6 housekeeping -- it's in the papers, but just so we're all on
7 the same page. When we first made a motion, the claim was
8 for \$88,660.08. Subsequently, we learned that the Debtor
9 had made a partial payment of those taxes in the amount of
10 roughly \$19,000. So, the amount outstanding is \$69,713.54.

11 THE COURT: And the Debtor contends that that
12 payment is in respect of the pro-rated post-petition
13 portion?

14 MR. GOODHOUSE: Yeah. Essentially, so, what the
15 dispute comes down to is, the Debtor's position, and
16 obviously they can state it better than I will, but that the
17 roughly \$70,000 that's unpaid is not properly categorized as
18 administrative expense. It should be considered a
19 prepetition claim because it's applicable to the earlier
20 part of 2018.

21 THE COURT: The taxes themselves accrued pre-
22 petition?

23 MR. GOODHOUSE: The taxes -- yes, that's right.
24 So, what we really come down to is just, I think, it's a
25 statutory interpretation argument. And the key provision is

1 section 635(d)(3) of the code.

2 THE COURT: Three sixty-five.

3 MR. GOODHOUSE: What did I say? Sorry about that.

4 THE COURT: You transposed a couple of numbers, no
5 problem, 365(d)(3).

6 MR. GOODHOUSE: My temporary dyslexia; apologies.
7 It requires timely performance of obligations of the Debtor
8 arising from and after the order for relief under any
9 unexpired lease of nonresidential real property until such
10 lease is assumed or rejected. Not many courts have actually
11 directly addressed this question here, where what you have
12 is property taxes that aren't billed until the end of the
13 year, which is what the case is in South Carolina, at least
14 in Greenville County, South Carolina, where what you have a
15 lease obligation that comes up following the petition. But
16 the tax period covers both prepetition and post-petition
17 periods. The question really boils down to, do you read
18 Section 365(d)(3) and give a plain meaning to those words,
19 or do you find that there's ambiguity in there, and starts
20 taking to account certain policy considerations that may
21 adjust how you're going to read this. And you have
22 different -- different Courts have come to different
23 conclusions on this issue.

24 Now, the Debtor's notes the In re Child World
25 case, which found, as they would like Your Honor to hold

1 here, that the portion of the taxes applicable to the
2 prepetition period would not fall under 365(d)(3). But then
3 about three months after that case came down, the In re RH
4 Macy case came down where Judge Sotomayor looked directly at
5 the Child World case, considered it and, I think in sum and
6 substance, that ruling came out to be -- I understand the
7 policy considerations being discussed in the Child World
8 matter. I'm not going to read ambiguity into words of the
9 statute where I see none. And it's really, you know, it's
10 the same thing, and I took note of it when you were issuing
11 the decision on the first motion here, in discussing the
12 rules and interpretation of contracts. And it's really no
13 different with statutory language. Yes, you have to
14 consider overall policy objectives, and you have to consider
15 the totality of the statute. But that doesn't override the
16 actual words. And just because two parties had different
17 understandings of their meanings, doesn't mean there's
18 ambiguity there.

19 Now, I think, frankly, what seems to me at least
20 to be the critical decision here is the term 'arise.' Does
21 the obligation arise prepetition as the taxes are accruing
22 or does the obligation arise post-petition when the county
23 says the taxes are due, and then when they're do under the
24 lease? And I think the plain English meaning of that is, it
25 doesn't arise until the county says it's due, and it doesn't

1 arise under the lease until the payment is due. So, here,
2 the contrary example, or the example is, if Mauldin had,
3 some time in 2018, gone to K-Mart and said, "We want you --
4 ," for whatever reason, because they knew the bankruptcy was
5 brewing but that's really irrelevant; if they said, "We want
6 you to make a payment on your 2018 taxes," K-Mart would have
7 properly said, "No, we have no obligation to do that." That
8 obligation doesn't arise under the lease until the county
9 bills them. So, it's -- and the other --

10 THE COURT: Of course, that's what Judge Posner
11 had a real problem with. He said it didn't make any sense,
12 that very fact (indiscernible), and that's why he said in
13 Handy Andy that this can't be what --

14 MR. GOODHOUSE: In Handy Andy, yes, I understand -

15 -

16 THE COURT: -- this can't be what Congress meant.

17 MR. GOODHOUSE: And the Third Circuit has gone
18 other way on it. So, both parties in their briefing,
19 obviously, focused on this jurisdiction.

20 THE COURT: So, you have some real heavyweights
21 talking here, right?

22 MR. GOODHOUSE: So, you do --

23 THE COURT: Posner, Sotomayor.

24 MR. GOODHOUSE: -- certainly above my pay grade.

25 And the last thing --

1 THE COURT: Right. But actually, she recognized
2 too that it was kind of the logical ... But I don't think
3 anyone argued to her that the statute may have been just a
4 timing issue; not the timing of accrual versus arise, but
5 the fact that you actually have to pay.

6 MR. GOODHOUSE: I think, in that case, Judge,
7 actually, the parties' argument seemed to focus more on the
8 term 'obligation' than 'arise.' I found that in looking at
9 some of the subsequent cases 'arise' struck me as being the
10 key issue here. But one thing I would note about the policy
11 --

12 THE COURT: But I think that the point is -- and
13 actually, I think Judge -- I think it was Judge Sweet,
14 another heavyweight, in the Loews case, talks about -- yeah,
15 it was Judge Sweet -- talks about the focus of the statute
16 being on immediate payment, not so much on the world
17 'arising' and he distinguished the situation in Lowe's from
18 the situation where taxes would be accruing over time, even
19 if they're payable as of one date. So, I'm going to cut
20 this short. You want to brief this very well. This is an
21 issue that is clearly not decided in the Second Circuit yet,
22 and I believe it can go either way. And my view is that
23 this should be pro-rated here, that the full tax bill isn't
24 required to be paid under 365(d)(3). And I think that's the
25 majority view of the cases, generally. I wouldn't limit it

1 just to tax bills. I think you have to look at things that
2 accrue over time. And you're absolutely right, there are
3 circuits that go the other way. In fact, even though the
4 majority of courts apply the accrual analysis, the majority
5 of the circuit courts go the other way. But I think Judge
6 Posner actually does a really good job of analyzing it in
7 Handy Andy Improvement Centers 144 F.3rd, 1125 Seventh
8 Circuit 1998. And I do think it depends a lot on the
9 particular obligation, but I think with accruing taxes,
10 which is what Handy Andy covers, and of course with Child
11 World and Macy's did too, on contrary District Court
12 opinions, the better view would that Congress was trying to
13 do a lot of things in 365(d)(3), but the main ... but I
14 don't think it was intended, and I don't think the language
15 requires that tax bills that accrue over the length of the
16 prepetition period, as well as carrying over the post-
17 petition period have to be paid under 365(d)(3). And I
18 think the Urban Realtek Properties versus Loews Cineplex
19 Entertainment Corp case 2002 US District LEXUS 6186, April
20 9, 2002, goes into this in some detail at pages 18 -- I'm
21 sorry, 17 through 24, where Judge Sweet recognizes it's
22 appropriate to pro-rate in some cases, particularly taxes,
23 but not in that case where there was one overall payment.

24 I recognize that CenterPoint Properties, In re
25 Montgomery Ward, goes the other way; 268 F.3rd 205 Third

1 Circuit 2001, as well as, of course, the Macy's case. But I
2 think the majority of the cases doesn't, as discussed, for
3 example, in In re Rothman 2007 Bankruptcy LEXUS 2651,
4 Bankruptcy EDNY August 2, 2007. And also note that, for
5 what it's worth, the ABI Commission on reforming the
6 Bankruptcy Code sided with the pro-rating courts as to how
7 the landlord's claim against the estate should be treated.
8 See First Glance: Legislative Update ABI Commission,
9 Creating More Certainty in Chapter 11 for All Parties, 34-4
10 ABI Journal 12, April 2015. The recommendation is actually
11 at the very end of that article. So, I just think that the
12 statute is sufficiently ambiguous to look at the overall
13 bankruptcy policy. This is a lease that was rejected
14 ultimately, right?

15 MR. GOODHOUSE: Yes.

16 THE COURT: So, we look at 502(g) and 365(g), and
17 I'm going to deny your motion.

18 MS. MARCUS: Number Eight on the agenda is
19 actually one of the Debtor's motions. It's the motion of
20 the Debtors for entry of an order authorizing and approving
21 procedures for settling de minimis affirmative claims and
22 causes of action of the Debtors.

23 Basically, Your Honor, what we've proposed is a
24 procedure that would expedite the Debtor's ability to enter
25 into those kinds of settlements. We have discussed it and

1 actually run the procedures by the Creditors Committee. The
2 Creditors Committee made comments. We responded to the
3 comments and those comments are reflected in the proposed
4 procedures. Essentially, we're seeking authority to settle
5 claims that have a settlement amount of less than \$5
6 million.

7 We received only one objection to the motion.
8 That was the objection of Wilmington Trust, the successor
9 indentured trustee, with respect to the 2010 notes.
10 Wilmington asserts two objections. First, that the Debtors
11 have not provided any evidence of how many de minimis claims
12 may exist and may be resolved before plan confirmation.
13 Given the size of the Debtors' estates and the compressed
14 period in which these cases have taken place, I don't
15 believe there's anyone who can guess as to how many claims
16 there would be. Frankly, I don't know that I have one that
17 I can think of today, but we do think it would be in the
18 Debtor's estates and it would also assist the Court if we
19 were to approve these procedures. There's no downside to
20 doing it, so if there were five or if they were 100, I don't
21 think that would make a difference.

22 The second objection asserted by Wilmington is
23 that given the replacement liens that they were granted
24 under the final DIP order, they should not be excluded from
25 the opportunity to review and object to the proposed

1 settlements. Again, we're talking about the settlements
2 that are under \$5 million. On this, Your Honor --

3 THE COURT: I'm sorry, say that again, a
4 settlement ...?

5 MS. MARCUS: Settlements that are less than \$5
6 million, because settlements that have an amount more than
7 \$5 million would be subject to the normal noticing
8 procedures. I think in the last line of their objection,
9 Wilmington says, "Include us as a noticed party on those de
10 minimis settlements." The Debtors' perspective is that we
11 leave it to Your Honor. I think every time we add another
12 notice party on these kinds of matters, we're increasing the
13 cost and the delay and the hassle, frankly, of getting this
14 stuff done.

15 THE COURT: Although I think they're right -- I
16 mean, they're the fulcrum security, arguably, so I would
17 include them in indentured trustee. You don't have to give
18 it to every bond holder, it's just the indentured -- the
19 collateral agent and indentured trustee.

20 MS. MARCUS: Okay.

21 THE COURT: On the first point, these are -- it
22 doesn't say what you settled them for, right, it just says
23 settlement?

24 MS. MARCUS: It says settlement amount.

25 THE COURT: The settlement amount.

1 MS. MARCUS: So, if the claim is one where the
2 other party -- and we didn't seek authority to actually make
3 payments on any claims because these are affirmative claims
4 that belong to the estate. So, if the amount that the
5 estate is going to get is less than \$5 million, then we
6 don't need to -- we only notice the US Trustee, the
7 Creditors Committee and Wilmington Trust.

8 THE COURT: Okay. All right, Mr. Fox, you have
9 anything to say on this one?

10 MR. FOX: No, Your Honor.

11 THE COURT: Since you were on the second part.

12 MR. FOX: Yes. So, I don't have any -- we made a
13 motion as the collateral agent as well, which was for the
14 entire --

15 THE COURT: That's right. I keep saying -- it's
16 in both capacities.

17 MR. FOX: Yes, thank you, Your Honor.

18 THE COURT: Five million dollars is a lot of
19 money, obviously. There needs to be some review as this
20 motion provided for. And I think that the motion itself was
21 properly noticed under the case management order. The only
22 party that objected was the second lien trustee and
23 collateral agent. I take that very clearly to mean that
24 other parties of interest are comfortable with this
25 procedure. But I believe given the position of the second

1 lien debt in the capital structure that it should be also a
2 notice party. And with that change I'll grant the motion.

3 MS. MARCUS: Okay, Your Honor, we'll revise the
4 order and submit it to chambers with a copy to Mr. Fox in
5 advance.

6 THE COURT: Okay.

7 MS. MARCUS: The next item on the agenda is the
8 motion of Winners Industry.

9 MR. SMITH: Good afternoon, Your Honor, James
10 Smith from McKool Smith on behalf of Industry Co. Winners
11 originally moved for motion to grant administrative expense
12 priority for the goods that Winners sold to Debtors that
13 were received by the Debtors post-petition. Debtors oppose
14 this motion, arguing that the relevant date with which to
15 assess when the transaction occurred isn't the date the
16 goods were received, but is rather the date the goods were
17 shipped, which is pre-petition. So, Debtors are arguing
18 that because the goods were shipped pre-petition, the whole
19 transaction is a pre-petition transaction and doesn't fall
20 within the ambit of 503 --

21 THE COURT: But since then, they've argued that
22 you should just follow the order that covers all of these
23 types of claims, procedurally.

24 MR. SMITH: Our position is, we are urging Court
25 to adopt a reasoning of the Third Circuit in the In re World

1 Import case.

2 THE COURT: There's a ... maybe I'm confusing
3 this. Isn't there now a procedural order for dealing with
4 all of these types of claims?

5 MR. SMITH: There's a procedural order for
6 503(b)(9) claims which are not at issue today, and we agree
7 with them that those are subject to that order and those
8 will be raised at the appropriate time. With regard to the
9 503(b)(1) claims, there is an order on those procedures,
10 this specific motion, and this specific circumstance, in
11 which we're asking for a ruling on a very discreet legal
12 issue, was carved out of that order. And we informed
13 Debtors of this last Tuesday.

14 THE COURT: I'm not prepared to rule on this.
15 It's now 3:30. I've been in court, basically, 12 hours a
16 day since Monday. You're going to have to come back.

17 MR. SMITH: Thank you, Your Honor.

18 THE COURT: I'm sorry. You had to wait several
19 hours but this is just not acceptable to me.

20 MR. SMITH: Thank you, Your Honor.

21 MS. MARCUS: The next matters, Your Honor, we
22 categorized as automatic stay matters.

23 MS. PESHKO: Your Honor, the first of these
24 matters is the motion of Mario Aliano for relief from a
25 stay. I'm no sure whether counsel is in the courtroom.

1 MS. HARRIS: Good afternoon, Your Honor. This is
2 Sharon Harris. I'm on telephonically from Chicago.

3 THE COURT: Good afternoon.

4 MS. HARRIS: Good afternoon. I represent Movant
5 Mario Aliano. And this is motion to lift the stay in the
6 civil litigation. All that's remaining in his case is on
7 appeal. Just real briefly, the Circuit Court of Cook County
8 Illinois entered a judgment against Sears for violation of
9 the Illinois Consumer Fraud Act, and that was affirmed on
10 appeal by the Illinois Appellate Court in 2015. And the
11 matter was remanded on issue of attorneys' fees. There was
12 a three-day evidentiary hearing and the Court awarded
13 \$267,470 in attorneys fees. Sears appealed the Circuit
14 Court's award of the fees and Sears also (indiscernible) and
15 obtained an approval of an appeal bond. The appeal bond
16 covers the award plus one year of statutory interest.

17 THE COURT: But does it --

18 MS. HARRIS: So, the only thing --

19 THE COURT: I'm sorry. Does it actually cover the
20 fees? I thought that was the issue.

21 MS. HARRIS: Debtors have raised the issue of the
22 defense cost. The appeal has been fully briefed for several
23 months, and all that's awaiting is the decisions by the
24 Illinois Appellate Court. Debtors raise that there could be
25 some cost involved in arguing the matter on appeal, but

1 there's no guarantee that the Appellate Court would set the
2 matter for oral argument. It's within the Court's
3 discretion as to whether to set it for oral arguments. And
4 we're willing to waive our request for oral argument on the
5 appeal in order for the matter to go forward. And even if
6 here is oral argument, I think the cost to Debtors of
7 defending that would really be minimal because, as I said,
8 the matter has been fully briefed and it's just a matter of
9 whether the Court, Illinois Appellate Court orders there to
10 be oral argument in matter.

11 THE COURT: Okay.

12 MS. HARRIS: We've cited some cases in our brief
13 that the causative defending litigation by itself is not
14 necessarily enough to preclude relief from an automatic
15 stay.

16 THE COURT: Okay. Let me hear from the Debtor's
17 counsel.

18 MS. PESHKO: Your Honor, for the record, Olga
19 Peshko, Weil Gotshal for the Debtors. This particular
20 appeals bond is fully collateralized by Sears prepetition,
21 Your Honor, in the amount of over \$290,000. The Debtors
22 have an interest in this money and they're not willing to
23 waive their right to argue oral argument or to prepare for
24 that. And there's a cost associated with that. If the
25 Debtors do succeed at the appeal, then the matter may be

1 remanded, there may be other further proceedings. And so,
2 our view is that there's cause to keep the automatic stay in
3 place. Furthermore, Your Honor, there is no insurance
4 available for the incident date related to this action to
5 cover the Debtors' defense costs.

6 THE COURT: So, the appeal bond is collateralized,
7 it's not paid for, it's collateralized.

8 MS. PESHKO: That's right.

9 THE COURT: So, it's not like insurance.

10 MS. HARRIS: Your Honor, if it makes a difference,
11 we are willing -- the appeal ban covers the award plus one-
12 year statutory interest. We're willing to waive recovery
13 for attorneys' fees of any amount above and beyond the
14 appeal bond amount.

15 MS. PESHKO: With respect, that does not account
16 for the Debtors having to expend defense defend costs now.

17 THE COURT: Okay, but that does take care of the -
18 - I mean, the only issue that's on appeal is he defense
19 cost, right? So, they're not going against the appeal bond
20 for that?

21 MS. PESHKO: The issue on appeal are attorney fees
22 for the --

23 THE COURT: The attorneys' fees.

24 MS. PESHKO: Exactly.

25 THE COURT: So, maybe I misunderstood counsel. I

1 thought she was saying that they were not going to look to
2 the appeal bond for the attorneys' fees.

3 MS. PESHKO: I think == I don't want to put words
4 in her mouth but -=

5 MS. HARRIS: No, that's not what I meant, Your
6 Honor. What I'm trying to say is the only issue that's on
7 appeal is the amount of attorneys' fees and the appeal bond
8 covers the amount that the Circuit Court awarded plus one
9 year's statutory interest.

10 THE COURT: So, that would include --

11 MS. HARRIS: So, it's been beyond --

12 THE COURT: So, that would include the attorneys'
13 fees. The appeal bond includes the attorneys' fees.

14 MS. HARRIS: Yes.

15 THE COURT: So, what were you saying, that you
16 would waive? I thought I heard you say you would waive some
17 --

18 MS. HARRIS: The statutory interest beyond one
19 year.

20 MS. PESHKO: The appeals bond doesn't cover that.

21 THE COURT: Okay. So, we're not relating
22 anything. All right. Well ... How would the Debtors
23 propose this get resolved otherwise, if I didn't lift the
24 stay?

25 MR. FAIL: Your Honor, Garrett Fail, Weil Gotshal

1 & Manges for the Debtors as well. Your Honor, this is one
2 of a large number of pending litigations that will have to
3 be resolved post confirmation pursuant to a plan, whether
4 part of a liquidated trust or whatever structure is proposed
5 in that plan with the moneys available in judgments about
6 what's worth pursuing at that point. At this point, though,
7 with cash limited and a desire to protect the assets, the
8 Debtors chose to oppose the motion to preserve the stay and
9 status quo for an additional period which, for the cases to
10 continue.

11 THE COURT: So then, on the phone, do you have a
12 slot that you would lose with the Illinois Appellate Court
13 if I denied your motion for a stay of relief? In other
14 words, let's say I adjourned it until a date that I believe
15 would be a reasonable date for a plan to be confirmed, so
16 that will be post-confirmation, some time in August or
17 September. There will be a determination whether to go and
18 liquidate the claim at that point. Other than the delay, do
19 you lose anything else, the delay between now and September?

20 MS. HARRIS: Well, I would say that the Appellate
21 Court had the brief, fully-briefed, last August, I believe.
22 So, in that respect they didn't get the suggestion of
23 bankruptcy until October, and so we kind of lost our place
24 in line with the Appellate Court deciding that, because they
25 stayed the matter rather than ruling on the brief or

1 ordering oral arguments.

2 THE COURT: So, it's still locked in place based
3 on the automatic stay.

4 MS. HARRIS: Right. I would just say we got the
5 judgment against Sears and December 2015 it was affirmed, so
6 we've been waiting all this time for the attorneys' fee.

7 THE COURT: Well, you're going to be waiting
8 longer because it's -- the fees aren't covered anyway. So,
9 this is a fairly close call under (indiscernible) but I will
10 determine to adjourn the motion. I'm not going to require
11 you to refile it, but I'm going to adjourn it because I
12 believe the Debtors have a reasonable basis to win the
13 motion, but that's only for a relatively brief period until
14 the Debtors confirm a plan or something else dramatic
15 happens in the case. So, you'll have to refile it. But you
16 should get an adjourn date for the omnibus hearing in
17 August.

18 MS. HARRIS: Thank you, Your Honor. Okay.

19 THE COURT: Okay. It's just I don't think that
20 the result -- this is just liquidating a claim, except to
21 the extent that you would get paid by the bond, but that
22 hits the Debtor. It's not the equivalent of having an
23 insurance policy that's already been paid for. So, the
24 impact is significant and the reason to do it now as opposed
25 to a few months from now is not dramatic enough to warrant

1 lifting the stay, because it's a prepetition claim. So,
2 I'll ask the Debtors to submit an order that adjourns the
3 motion, making the finding that I need to make under 362(e).

4 MS. PESHKO: Thank you, Your Honor, we will. The
5 next item on the agenda is the motion of Steven Tuttle for
6 relief from the stay. Your Honor, I wanted to note that the
7 counsel that filed this motion has withdrawn as attorney for
8 this party, so we don't know whether anyone is appearing on
9 behalf of Mr. Tuttle.

10 THE COURT: Okay. Is anyone here or on the phone
11 appearing on behalf of Steven Tuttle on this lift stay
12 motion to pursue litigation in respect of a prepetition
13 claim?

14 MS. PESHKO: Your Honor, I wanted to also note
15 that while we file this objection to reserve our rights,
16 because we don't have any insurance available of our own, we
17 did confirm that a third-party insurer for the employer of
18 Mr. Tuttle at the time of the incident is paying defense
19 costs for Innoval, the debtor in this instance. However,
20 after counsel withdrew we reached out to get contact
21 information for his former client and he has not agreed to
22 provide us with a phone number or email. So, we've been
23 trying to reach out to reach a stipulation and we'd like to
24 just adjourn without a date, to be able to get in touch with
25 this party.

1 THE COURT: Okay, that's fine. We should provide
2 the same type of order that I just directed in the last
3 matter. Have you communicated to former counsel that you've
4 discovered this insurance at Innovel?

5 MS. PESHKO: That's what they've argued in their
6 motion.

7 THE COURT: No, I thought you said -- no, I'm not
8 talking about Sears. I thought you said there's a third
9 party that as insurance, the actual employer of this
10 individual.

11 MS. PESHKO: We haven't reached out to the
12 employer, Your Honor.

13 THE COURT: No, no, I said, have you reached out
14 to Mr. Tuttle's former counsel to let former counsel know
15 that you've located this third-party insurance?

16 MS. PESHKO: That's right. That's who we reached
17 out to try to negotiate a stipulation.

18 THE COURT: All right, so you told her that?

19 MS. PESHKO: Right.

20 THE COURT: All right. Because I was going to
21 direct you to do that if you haven't, but you've already
22 done it.

23 MS. PESHKO: We did it. We did that too, and
24 tried to get the contact information afterwards.

25 THE COURT: Okay. All right, that's fine. So,

1 you can just submit the adjournment order on that one.

2 MS. PESHKO: Will do.

3 THE COURT: It's likely that I would have denied
4 the motion subject to a step dealing with going against the
5 third-party insurance.

6 MS. PESHKO: Thank you, Your Honor. The next item
7 is the motion of Jeffrey Pfeiffer to lift the stay. I'm not
8 sure whether someone is here --

9 THE COURT: This is Mr. Pfeiffer's motion?

10 MR. GALLAGHER: Yes. Good afternoon, Your Honor,
11 Dave Gallagher on behalf of Mr. Pfeiffer.

12 THE COURT: Right, good afternoon.

13 MR. GALLAGHER: Your Honor, if you'd like brief
14 argument I would just state this is a motion to lift the
15 stay with regards to a pre-suit action in Illinois that we
16 filed in the Circuit Court of Cook County against K-Marts as
17 well as a co-defendant, Monsanto, with regards to cancer
18 that my client developed after use of Roundup. As the
19 Court's aware of the (indiscernible) factors, the big issue
20 with regards to the Defendant's objection -- the Debtor's
21 objection -- is that of insurance coverage. The period of
22 time with which Mr. Pfeiffer claims he purchased this
23 Roundup spans from 1988 until 2014. The Debtor's counsel,
24 their objection notes that their records with regards to
25 coverage only go back to 2005. They do provide exhibits to

1 their spots, which indicate that coverage is exhausted for
2 multiple years. However, they did not provide any
3 explanation for coverage for the period of 2008 to 2009,
4 which leaves me to believe that there was, in fact, coverage
5 available for that time period. Their coverage does provide
6 (indiscernible) defense for the case. The Claimant here
7 simply seeks to move forward their claim. We believe
8 there's available insurance coverage which would include the
9 cost of defense and, in exchange, the Debtors would get
10 complete relief from the claim other than whatever is
11 available, and insurance proceeds. We believe it to be in
12 the benefit of the Debtors and it would expediate the
13 resolution of this claim.

14 THE COURT: I'm sorry, I missed the last sentence.
15 I couldn't follow what you were saying. Can you --?

16 MR. GALLAGHER: Sure. It would be to the benefit
17 of the Debtors, it would expediate the resolution of this
18 claim.

19 THE COURT: It's a prepetition unsecured claim to
20 the extent it's not been discharged in K-Mart's bankruptcy.
21 If there is available insurance, I'm sure the Debtors would
22 lift the, agree to lift the stay to let you go against the
23 insurance. They're saying there isn't available insurance.
24 You're saying that they haven't shown you that fact for 2008
25 through 2009? Okay.

1 MR. GALLAGHER: That's correct.

2 MS. PESHKO: Your Honor, that's correct. We have
3 not provided a certificate of exhaustion for that period.
4 The Debtors believe there is no -- the insurance has been
5 exhausted for that period. However, we are trying to obtain
6 a copy from the insurer. We informed counsel that we would
7 like an adjournment to be able to get information, also to
8 confirm the discharge issue and counsel has not agreed to
9 adjourn.

10 THE COURT: Do you have any problem lifting the
11 stay solely as to 2008 and '09, to the extent that there is
12 insurance and that the Claimant waives any other claim
13 against K-Mart?

14 MS. PESHKO: If we can confirm that there is
15 insurance we'll do that --

16 THE COURT: If part of the stip stays this waives
17 a claim against the Debtors, except to the extent of any
18 available insurance policy and we make no representation
19 that there is one, is there any issue there?

20 MS. PESHKO: We would be willing to do that
21 except, Your Honor, that Sears would be required to defend
22 itself. I mean, K-Mart would be required to defend itself
23 in this action. Or we could try to provide first a
24 statement from the insurer that it's not there so that we
25 don't have to proceed with the stipulation?

1 THE COURT: Well, what efforts are you making to
2 determine that?

3 MS. PESHKO: We have reached out to the Debtors
4 and we're trying to work with them to get this letter of
5 exhaustion. It's just, we're just looking for additional
6 time to do that, Your Honor.

7 MR. GALLAGHER: Your Honor, if I may, the issue
8 for me is one of statute of limitations on my claims. These
9 claims are going to be going forward on a discovery basis.
10 I'm not sure of your familiarity with the Roundup
11 litigation, but this has really started to be a public --

12 THE COURT: Well, it can certainly wait a month or
13 two, I'm assuming, right?

14 MR. GALLAGHER: In theory, maybe. It's going to
15 depend on what the parties respond as far as their response
16 to the pleading filed in the State Court. But my client
17 could suffer prejudice in the loss of his ability to bring
18 these claims if we delay this inadvertently.

19 THE COURT: Well, there's nothing in the motion
20 about whether he learned about Roundup, right? And
21 apparently, he was buying it until 2014.

22 MR. GALLAGHER: That's correct. That's when he
23 was diagnosed.

24 THE COURT: He was diagnosed in 2014?

25 MR. GALLAGHER: That's correct.

1 THE COURT: Okay. So, what is the statute of
2 limitations for this type of claim in Illinois?

3 MR. GALLAGHER: It is two years from when you knew
4 or should have known of the harm and the potential cause.
5 So, the literature regarding the AML, my client's form of
6 leukemia, and his exposure to Roundup really started coming
7 out in 2017. There's a critical article that was published
8 on November 9, 2017 that I would argue would be the point at
9 which he knew or should have known of the association
10 between AML and Roundup.

11 THE COURT: Okay. Adjourning this to the June
12 omnibus day doesn't seem to affect the statute of
13 limitations. And I thought you already commenced this
14 lawsuit. You didn't? You haven't yet? All right.

15 MR. GALLAGHER: I have not yet. I was aware of
16 the stay once I got --

17 THE COURT: All right. Have you filed a claim in
18 this case?

19 MR. GALLAGHER: I did.

20 THE COURT: All right, so that's enough. You've
21 asserted the claim. So, I'm going to adjourn this for two
22 months so the Debtors can see whether it's worthwhile to
23 enter into the type of stipulation that I mentioned for
24 2008, 2009.

25 MS. PESHKO: Thank you, Your Honor.

1 MR. GALLAGHER: Thank you, Your Honor.

2 MS. PESHKO: That was the last matter on the
3 agenda today.

4 THE COURT: Okay, very well.

5 MAN 1: Thank you very much for your
6 (indiscernible) today --

7 THE COURT: I'm really impressed by those who
8 stayed for the whole thing.

9 (Whereupon these proceedings were concluded at
10 0:00 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: April 22, 2019

[& - 2017]

Page 1

&	10005 9:12	1394 40:14	2,100 158:9
& 8:3,12 9:2,9,16 132:4 170:3 174:24 191:1	10006 8:15 9:5	14 62:2 75:18	2.1 32:17,20 77:16 79:11
0	10019 10:11	14.6 36:16,17 37:10 39:1 71:5 71:10,17,18 72:20	2.10 32:7,19 48:5
03 75:7	10022 8:22	14.9 27:18	2.1d 47:9
05 75:10	1015 78:8	140 17:8	2.1p2 47:10
09 197:11	10153 8:6	143 56:25	2.3k 56:15
0:00 200:10	105 2:9 5:18 93:3	144 180:7	20 67:12 171:23
1	10601 1:14	15 33:12,23 34:3 34:10 36:9 40:17 43:10 73:8 128:16 171:9	200 9:18 10:3
1 47:15 56:15 74:13 76:13,17 104:16 151:19 186:9 200:5	10:00 7:15	157 163:11	2001 75:2 181:1
1,657,000,000 35:4,7	10:46 1:17	16 88:24	2002 180:19,20
1.1 75:25 82:13	11 2:8 5:17 6:16 13:18 14:15,18,20 105:15,16 162:16 162:17,17 163:13 163:13,21 164:2 166:5 181:9	1633 10:10	2003 163:15
1.1.1 48:17 80:17	110 93:21	166 87:3	2005 195:25
1.3 27:20,21	1125 180:7	16th 15:1 89:6 163:22	2007 181:3,4
1.553 76:25	1129 101:15 102:2	17 180:21	2008 196:3,24 197:11 199:24
1.646 170:19	11501 201:23	177 50:15	2009 196:3,25 199:24
1.657 37:7,18 38:14 63:4,16 64:5 71:3 76:16 76:18,20 77:4 83:20	1192 74:9	18 1:16 7:15 44:8 180:20	2010 182:9
1.9 13:3	1195 74:9	18-23538 1:3	2012 74:17,18,25 75:1,1,7,10,10,17 75:18 122:8,10 128:13 129:4 152:19
1/1/2018 6:18	11th 172:25	19 24:12,15 40:16	2013 74:14
10 30:11,17 137:17	12 109:22,25 117:3 181:10 186:15	19,000 175:10	2014 195:23 198:21,24
10.9 34:25 36:3,5 36:12 38:17 40:5 47:12,14 55:22 57:12 62:17 63:4 64:4 68:18 71:10 73:24 76:11 77:5 80:4 83:18 84:16	12,000 121:14	19.5 27:25	2015 132:25 181:10 187:10 192:5
10.9. 30:16 37:24 47:3,12 56:1 62:20 84:13	12/31/2018 6:18	198 50:16	2016 122:18 132:25
100 142:15 153:6 182:20	1280 4:23 5:9	1983 67:24	2017 109:2 114:20 123:10,13,15,15 123:19 124:18,18 124:19 125:11 128:18 132:24 133:20 148:12,13 148:23,23 149:19 149:20 150:22 151:6,16,25,25 152:18,19 155:14 157:5,6 161:19
	12th 105:23	1988 195:23	
	13 74:13 131:8	1990 106:10	
	13.3 69:15	1992 74:9	
	13.4 32:1	1998 180:8	
	13.8 74:5	1st 170:18	
	1334 104:16,16,21 104:25 105:10,17 111:8,12 117:8 162:13,21 163:4 164:15 165:22 167:10	2	
	1381 57:1	2 2:17 6:16 31:8 47:14 76:14 104:16,21,25 105:10 111:8,12 117:8 162:13 163:4 164:15 165:22 167:10 181:4	
	1386 7:12		

[2017 - 55]

Page 2

165:6 199:7,8 2017-2018 109:6 2018 88:12 105:23 109:2 114:20 123:16,18,18 124:19,19,20 125:9,11 128:18 133:8 141:23 148:13,16,22,24 148:25 157:6,6 160:5,10 161:21 170:17 175:1,20 178:3,6 2019 1:16 2:17 7:15 88:24 89:7 133:8,12,14 163:22 201:25 205 180:25 21 115:25 172:2 21,000 120:13 214 43:3 21st 29:5 22 201:25 22.5 24:12,14 22nd 62:10 24 180:21 24,000 121:14 2414 2:12 5:21 2425 9:18 248 1:13 250,000 171:10 2508572 74:17 26 170:18 2651 181:3 267,470 187:13 268 180:25 2690 6:19 26th 23:16 24:3 24:13 27:12,23 27,000 120:14 2715 4:16,23,24 5:3	2717 4:23 2766 2:5 3:12 2796 2:5,18,23 3:5 3:13,21 28 9:11 33:12 69:12 162:13 163:11 2808 3:24 281-288 75:2 2819464 75:17 2832 5:23 2839 7:17 2864 2:23 3:14 29 74:18 75:1 29.4 28:2 290,000 188:21 2922 6:5 293 163:14 2980 6:11 2989169 74:25 2996 4:25 5:2 3 3 2:9 5:18 24:4,7 47:14 76:16,18 103:9 176:1,5,18 177:2 179:24 180:13,17 3.05 163:22 3.12 45:10 3.14. 45:10 3.8 13:1 30 67:12 102:9 112:12 113:7,11 115:15 119:8 136:8 137:23 139:22 157:16,18 157:19 300 1:13 4:21,25 5:4,6,11,14 9:17 10:2 103:14 104:5 115:1 120:13 161:25 201:22	300's 4:18 3011 2:19 303 110:8 117:17 117:17 3031 7:4 3050 4:5 3079 2:23 3:5 308 163:14 3080 28:14 29:1 3144 7:7 3156 3:6 3163 6:21 3168 6:13 3169 6:2 3198 4:12 31st 10:10 3210 4:12 3225 6:23 3247 5:4 330 201:21 331 163:14 34-4 181:9 35 144:16 36 75:7,19 360 63:19,20 362 164:13 193:3 363 2:9 5:18 90:24 365 2:9 5:18 176:5 176:18 177:2 179:24 180:13,17 181:16 381 75:10 3:30 186:15 3rd 23:17 24:6 27:15 4 4 74:25 103:12 145:12,12,17,17 164:18 4,250 122:12,20 122:21 123:10 124:7 126:1,7,21 129:6 130:3	134:13 147:22 151:19 152:2,23 153:2,19 165:5 4,300 158:8,13 4.3 44:12 4.4 55:7 4.5 147:21 161:5 4.6 69:3 4.7 54:16 55:10 82:4 4.7. 55:9 40 121:21 145:20 168:6 41 75:10 45 142:17,25 144:24 145:18 150:8 160:14 4th 24:10 27:17 27:24 5 5 27:12,16,23 33:17 74:18 145:18 156:1,2,7 157:9,11,11 182:5 183:2,5,7 184:5 500,000 170:22 502 181:16 503 2:9 5:18 6:16 6:16 16:22 99:8 185:20 186:6,9 506 93:3,3 98:13 99:11,14 100:10 507 6:16 17:11,14 17:21 18:1,21 22:18 100:8 101:6 101:16 102:1 522 57:1 542 73:13 104:17 107:18,25,25,25 108:14 164:10 165:13 55 142:17 143:4 144:20,21,23
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[55 - act]

Page 3

145:18 160:21 552 93:3 57.935 43:10 599 8:21	9	115:17 131:22 132:7,9,19 133:23 134:2 135:14 139:4,4,15 140:25 147:10 162:2,9,12 162:14 163:5,10 165:14 166:23 accept 147:12,14 156:18 174:11 acceptable 186:19 acceptance 165:1 accepted 164:25 accepting 32:4 access 49:23 101:14 accommodate 38:8 accomplish 172:24 accomplished 172:23 account 28:11 31:3 33:2 35:10 35:16 38:20 41:19 41:20 42:2,5,5,8 42:13 44:2,17 46:22 47:6 48:17 48:18 49:22,24 51:3,8,16 53:5 55:2 62:16 65:10 68:1,1,4 69:22 76:1 78:23 80:19 80:22 81:4,16 82:8,14,23 84:6 84:10 94:14,15 98:19 99:4,5 114:10 123:7 141:12,20 169:6 176:20 189:15 accounting 123:12 accounts 23:7,24 23:25 24:17,18	29:6,7,17,18,21 29:24,25 30:3,7,8 30:13,18,24 31:5 31:10 32:5,7,10 32:14,15,18,22,23 32:24 33:1,9,9,13 33:14,18 34:15 35:2,12,19 36:1,6 36:13,22,25 37:3 38:16,17,21 39:17 40:2,6,11,16,24 41:11,13 43:8 44:4 46:3 47:2,15 47:17 49:12,15,23 50:1,4,8,25 52:5,8 52:10 53:10,24 54:7 55:16,24 57:10,15 63:7 64:11,24 66:14 68:6,8,9,13 69:1,2 73:21,23 74:1 75:25 76:15 77:3 77:7,13,14 78:5 78:11 79:21,23 80:1,5,12,16 83:17 84:3,5,17 accrual 179:4 180:4 accrue 180:2,15 accrued 175:21 accruing 177:21 179:18 180:9 accurate 134:1 149:18 201:4 acquiescence 155:20 156:13 acquired 47:9 64:8 76:13,22,25 78:3 act 57:5 105:3 106:8,11 107:8 124:5,10 126:3 129:2 130:1
6	9 16:22 99:8 101:15 102:2 180:20 186:6 199:8 9.1022 80:21 9.6 141:20 142:1 9.9 27:22 28:1 90 13:1 98:23 93 98:19		
6 109:22,25 117:3 119:8 137:23 139:22 157:16,18 157:19 60 15:7 101:7 102:11 105:6 112:12 113:7 115:16 136:8 166:22 600 47:15 60440 10:4 60606 9:19 61 81:2 616 74:9 6186 180:19 631 10:3 635 176:1 65 143:10 652 4:23,24 5:7,14 656 57:1 657 49:11 69,713.54. 175:10	a a.2d 74:9,13 75:2 a.3d 75:7,10,19 a.m. 7:15 abena 2:18 3:5,13 abi 181:5,8,10 abilities 63:5 ability 16:13 90:19 91:6 97:19 128:5 155:12 166:2,4 181:24 198:17 abl 89:5,8 91:4 92:13 95:5 able 18:9 122:23 151:3,8 154:11 193:24 197:7 absent 105:16 111:21 162:19 163:8 absolute 163:21 absolutely 22:6 96:15 101:21 108:5,7 116:11 136:6 142:3 180:2 abstain 105:11 111:4 115:8 162:4 162:11,24 163:5 167:9 abstaining 168:13 abstention 4:22 5:13 103:15,19 104:15,21 105:22		
7			
7 37:7,23 38:1,13 59:16,21 72:6,7 72:11,19,20 70,000 175:17 767 8:5 776 75:7 779 75:19 785 75:2			
8			
81 113:10 837 74:13 88,660.08. 6:18 175:8			

134:12 138:7,7,8 138:8 139:2 150:25 152:9,17 152:17,20,20,22 152:25 154:22 155:25 156:1,7 157:8,11 161:3,5 161:6 167:1 187:9 action 7:3 21:1 62:9 86:9 93:20 105:14 106:8,14 106:15 108:18 111:14 132:17 134:8 159:16 162:16,18,25 163:7,8,18 181:22 189:4 195:15 197:23 active 21:9 115:2 155:21 158:5,8,11 166:14 actual 22:8 151:22 152:3 165:9 177:16 194:9 acumen 12:17 adams 9:18 add 109:5 118:20 171:10 183:11 added 134:23 addition 73:22 150:8 additional 24:9 37:9 46:2 71:7 72:8 191:9 198:5 address 17:25 53:6 55:17 58:5 90:23 111:16 137:24 150:18 155:6 163:20 170:8 addressed 70:7 91:25 132:8	176:11 addresses 52:11 addressing 29:3 141:1 168:7 adds 147:16 adequate 96:19 97:23,24 170:23 171:16 adheres 75:11 adjourn 170:21 192:10,11,16 193:24 197:9 199:21 adjourned 170:8 191:14 adjourning 171:23 199:11 adjournment 170:22,25 195:1 197:7 adjourns 193:2 adjudicate 112:3 163:24 164:1 adjudicated 136:14,21 139:16 141:12 163:1 165:24 167:5 adjudicating 111:23 adjudication 105:18 111:14 163:10,16,17,19 164:19 166:13 167:7 adjust 27:6 176:21 adjusting 39:17 adjustment 47:20 63:17 64:12,15,16 65:16,19,20 66:1 84:13 adjustments 78:24 79:16	admin 19:4 administrative 6:15 7:9,11 14:23 18:24 87:5 99:6,7 99:8 100:2,3,6,6 100:14 113:24 114:4,5 166:2,4 174:21 175:18 185:11 admission 25:1 28:22 admit 28:25 admits 33:17 admitted 29:1 37:17 adopt 185:25 adoption 14:1 advance 19:6 100:19 136:4 167:23 185:5 advancement 161:12 advise 87:24 advised 23:10,14 27:18 89:2 137:3 affairs 14:19 18:11 affect 199:12 affidavit 55:2 affiliates 170:4 affirmative 7:3 181:21 184:3 affirmed 187:9 192:5 afternoon 51:21 87:16 104:4 170:2 172:21 174:23 185:9 187:1,3,4 195:10,12 agency 127:14,15 agency's 127:18 agenda 7:14 12:6 22:24 23:1 39:9	87:10 103:8 137:18 170:5,7 172:20 181:18 185:7 193:5 200:3 agent 4:2,10 87:18 88:1,7 96:9 99:2 183:19 184:13,23 aggregate 35:1 37:23 47:13 71:10 76:12,17 ago 15:7 108:17 agree 22:1 62:22 63:25 65:9 89:11 89:19 145:2 170:21 186:6 196:22 agreed 33:11 37:22,25 38:8 51:13 59:1 72:12 72:13 73:9 144:15 150:8 157:2 167:20 170:19 171:10 193:21 197:8 agreement 2:2,15 3:3,9,18 23:2,10 23:15 24:3,6 26:16,17 27:6,11 31:8,16,21 35:23 38:19,23 43:12 44:12,25 45:1,2,3 46:18,18 49:7 50:9 52:24 54:17 59:21 67:3,5 73:16,22 74:5,6 75:21 79:1 80:8 80:15 82:4 94:2 106:10 107:2 117:24 121:7 125:23 130:2 149:11 156:13 157:22 161:8,8,13
--	--	---	--

[agreement - applies]

Page 5

161:17 162:8 165:1 173:8 agreements 29:4 29:9,15,16,23 30:4 31:18,19,25 32:2 34:17 38:22 42:23,25 43:21 44:22 47:23 49:1 49:2 54:9,14 55:15 57:5,6,19 59:4,6,7,9 78:1,10 78:14,17 79:10 81:11,15 121:8 agrees 62:24 104:23 ahead 87:14 110:17 160:4,5 175:4 air 73:6 akin 15:20 18:16 al 3:23 12:3 alan 104:8 albeit 82:15 alert 101:11 aliano 186:24 187:5 allen 4:24 5:3,13 allocated 171:12 allocation 102:8 allow 20:8 90:16 100:5 114:23 157:8 171:7 allowance 7:10 77:23 allowed 101:16 102:23 allows 148:20 alta 75:9 alternative 4:22 5:12 21:19 22:19 49:25 93:15 103:15 162:1	alternatively 6:8 90:24 172:19 alternatives 22:18 alves 10:18 ambiguity 74:21 74:22 75:3 176:19 177:8,18 ambiguous 75:8 181:12 ambit 185:20 amenable 103:17 103:17 amended 31:8 122:6 128:13 152:21,21,25 american 31:7,9 51:4,5 74:8 amex 43:7 44:25 46:18 78:17 aml 199:5,10 amount 15:13 24:7,11 31:11,11 34:15 35:1,6,6,7 43:24 44:1,1,23 44:25 47:13 49:9 56:24 57:17 61:3 63:4 64:5,24 70:3 71:4,11 76:13,14 76:17,19 78:25 82:5 93:10 127:19 143:11 175:9,10 182:5 183:6,24,25 184:4 188:21 189:13,14 190:7,8 amounts 2:10 5:19 23:19 26:4,5 26:22,23 27:6,7,7 27:16 35:1 36:21 40:23 44:2 52:25 69:13 71:7 78:12 79:3,15 81:14,16 83:15,16,19,20,21 84:16,19 86:3	132:23 analogies 110:7 analogy 110:6 analysis 21:18 22:3 104:19,25 118:5,7 166:12 180:4 analyzed 93:20 analyzing 180:6 andy 178:13,14 180:7,10 annexed 88:21 announced 25:14 answer 20:21 39:6 44:15 67:20,21,21 104:25 107:10 116:9 123:15 126:13 136:2 143:10 159:2 167:13 answered 41:25 55:18 answers 41:7 antecedent 70:15 83:8 anticipate 25:6 28:7 anticipated 78:24 anybody 136:2 142:8 anymore 90:11 151:1 anyone's 106:5,19 anytime 131:16 anyway 192:8 aog 111:17 apa 25:21 30:1,6,8 31:17,25 32:2,3 32:22,25 33:1 34:25 43:14,17 44:15,16 56:8,11 56:14 59:6 60:4,9 62:12,17 66:19,20	66:23 73:22,24 74:5 75:25 76:11 77:15,16 79:12 80:17 95:1 171:20 171:21 apa's 78:6 apart 26:2 34:13 83:11 apa's 29:7 32:6,17 apologies 176:6 apologize 65:21 apparently 27:20 198:21 appeal 166:24 187:7,10,15,15,22 187:25 188:5,25 189:6,11,14,18,19 189:21 190:2,7,7 190:13 appealed 187:13 appeals 136:7,9 136:12 188:20 190:20 appearing 193:8 193:11 appears 82:1 83:7 85:4 163:17 appellate 136:18 158:18,20,23 159:5,18 166:17 187:10,24 188:1,9 191:12,20,24 applicable 31:23 40:5 48:4 68:3 80:14 118:6 130:6 175:19 177:1 application 73:15 152:24 applied 67:24 84:18 applies 35:23 159:9
---	--	--	--

[apply - authority]

Page 6

apply 46:5 78:5 180:4	arguing 19:7 32:17 36:2,4,20	135:25 146:21 155:16 158:9	assume 6:7 59:8 59:24,25 60:3
applying 70:15 162:9	36:23 37:1 52:16 88:9 121:23	162:11 168:24 170:25	63:19 66:12 110:13 158:19
appreciate 21:6 170:24 171:11	145:24 155:15 185:14,17 187:25	asking 110:13 137:9 143:12	171:9 172:19 173:3
appreciates 39:13	argument 29:20 30:2 31:24 42:9	146:24 160:15 186:11	assumed 59:9 176:10
appropriate 110:12 118:3	45:3 46:4,9 50:5 55:14 56:4,4	asks 124:18	assuming 29:12 111:5 120:6
131:25 149:23 155:17 163:1,9	67:13 69:5,21,24 70:4 80:9 92:5,6,7	aspect 85:1,9	130:23 145:1 198:13
180:22 186:8	107:1 109:22 112:20 123:11	assembly 128:4 129:22	assumption 17:7 17:7 66:4 120:21
appropriately 84:18	124:9 130:18 131:22 138:16	assented 74:24 assert 61:25	173:16 assurance 165:19
approval 187:15	147:12 154:15 155:18 159:6	122:23 asserted 26:2,16	165:20 171:16
approve 182:19	163:23 164:7 174:1 175:25	75:15 182:22 199:21	asway 47:13
approved 88:20 88:21,23	179:7 188:2,4,6 188:10,23 195:14	asserts 182:10	athenian 75:6
approving 7:2 181:20	arguments 53:7 80:14 131:19	assess 185:15	atkinson 157:14
approximately 17:8 69:11 143:11	142:9 147:20 188:3 192:1	asset 2:1,15 3:2,9 3:17 23:1 35:9	attached 37:20 98:18 113:9
166:22 170:18	arising 51:10,12 68:5 80:24 81:7	44:17 64:10 65:25 73:15,21 74:4	attaching 156:20
april 1:16 2:17 7:15 23:17 24:6	162:17,17 176:8 179:17	77:1,1,9 78:3	attempt 74:10 131:11 164:12
24:10 27:15,17,24 170:18 180:19	arlene 10:18	assets 15:14 16:10 23:11 63:6 71:15	attorney 143:24 189:21 193:7
181:10 201:25	arrangement 54:10	71:15 77:6,10,24 89:1 113:23 191:7	attorneys 8:4,13 8:20 9:3,10,10,17
aptly 78:19	arrears 148:12	assign 2:4 3:12,20 6:8 59:3,5 172:19	10:2,9 187:11,13 189:13,23 190:2,7
area 136:25 153:6 153:10 166:15	arrived 72:16	assigned 59:7,24 173:11	190:12,13 192:6
aren't 34:19 49:15 60:24	article 108:21 181:11 199:7	assignment 161:18	audit 160:3
arguably 183:16	asher 10:19	assist 182:18	augmented 108:19
argue 92:12 97:14 117:21 121:24	asked 14:25 22:17 29:2 54:25 91:18	associated 15:10 15:14 61:8 62:4	august 181:4 191:16,21 192:17
188:23 199:8	91:18 103:19 119:10 120:5	188:24	austin 11:22
argued 100:13 131:21 179:3	122:25 123:13	associates 158:7	authentic 119:20
185:21 194:5		association 4:1,5 4:9 7:7 8:20 87:18	authority 19:13 22:7 91:3 126:15
argues 31:15 32:2 82:6 165:7		199:9	126:16 160:5 182:4 184:2

[authorize - beneficial]

Page 7

<p>authorize 128:9 authorized 88:19 94:8 authorizes 149:4 authorizing 7:2 88:12 181:20 automatic 2:2,16 2:22 3:3,9,18 4:22 5:7,12 23:2,12 25:2 39:1,11,15 39:18,25 85:3,7 103:14 107:18 115:3 162:1 164:13 186:22 188:14 189:2 192:3 availability 70:2 82:4 available 34:1,11 93:10 151:8 189:4 191:5 193:16 196:5,8,11,21,23 197:18 avenue 8:5,21 average 121:21 avoid 116:25 awaiting 101:2 187:23 award 187:14,16 189:11 awarded 187:12 190:8 aware 14:22 21:20,23 147:4 174:13 195:19 199:15</p>	<p>101:16 102:1 109:22,25 117:3 119:8 137:23 139:22 157:16,18 157:19 161:5 163:11 167:12 186:6,9 b.r. 163:14 back 24:2 30:25 42:10,14,16 45:19 58:19 59:14 61:9 62:10 64:23 66:6 90:22 92:9,14 103:4 105:3 115:9 117:3 118:4 124:9 133:1 135:20 139:7 142:13,14 142:21 146:19 149:1,3 160:21 161:15 168:25 172:4 186:16 195:25 backdrop 32:3 40:18 background 120:12 backup 27:17 badges 154:9 158:5,8,11 balance 20:9 ball 158:25 balls 73:6 ban 189:11 bank 15:24 23:24 23:25 24:17,18 bankruptcy 1:1 1:12,23 49:20 50:16 57:1 73:14 78:7 104:9 110:9 112:20 114:10,11 138:22,23 139:9 141:13 150:21 159:17 160:12</p>	<p>162:22 163:8,13 164:3,3,5,11 178:4 181:3,4,6 181:13 191:23 196:20 bar 16:22 18:25 19:5 166:14 base 38:6 81:11 171:18 based 17:1 39:14 49:3 51:14 53:1 71:7,9,9 74:4 75:20 78:16 81:10 82:3 84:12 105:13 121:9,10 123:21 124:12 128:21,21 128:23 130:1 136:5 162:15 163:6 164:16 167:3,8,11 168:18 192:2 basically 12:20 105:10 110:25 111:18 112:1 113:1 156:21 181:23 186:15 basis 2:10 5:19 23:14 25:6,9 27:3 28:8 36:10 49:5 49:16 51:1 54:22 54:23 73:25 79:3 83:2 85:9 91:19 111:3 131:17 136:14 150:16,25 161:9 162:13 163:8 164:5,14,20 165:14,17,24 166:18 167:20 168:20 192:12 198:9 bear 102:23 beginning 40:8,9 40:12,21 101:2</p>	<p>132:6 151:25 begun 100:25 behalf 2:11,18 3:6 3:13,22 4:4,15,24 5:3,13,20 6:11 12:5 23:6 42:11 42:11 87:17 95:22 97:16 103:8 104:5 115:1 132:4 143:25 144:3,18 170:3,11 172:22 185:10 193:9,11 195:11 believe 12:18 13:5 14:24 16:14 18:7 18:12,16 20:20 27:21 28:2,18 29:9 42:19 59:13 59:22 73:25 74:3 75:21 77:4 80:7 80:18 82:11 83:3 83:25 84:2,4,9 86:3,4 87:10 88:7 89:13 91:1,19 93:6 94:8 99:10 101:6 104:22 111:15 113:4,6 138:2 142:14 143:2 147:7 165:13,18,21 166:11 167:10,17 170:5 171:7 172:23 173:12,19 179:22 182:15 184:25 191:14,21 192:12 196:4,7,11 197:4 believes 113:17 166:19 belong 50:18 62:11 184:4 beneficial 18:17</p>
<p>b</p>			
<p>b 1:21 2:3,9,16 3:4,10,19 5:18 6:16 10:25 16:22 17:11,14,21 18:1 18:21 22:18 55:2 99:8 100:8 101:6</p>			

<p>beneficiary 165:5 benefit 20:11 21:19 64:14 125:21 129:25 149:15 196:12,16 benefits 120:2 berkeley 75:9 bernice 2:11 5:20 6:4 170:6,12 best 18:12 20:15 43:20 52:15 114:12,14,22 151:8 159:1 better 29:11 148:2 151:12 175:16 180:12 beyond 24:7 44:12 71:7 89:6 122:2 150:12 189:13 190:11,18 big 64:2 195:19 bill 129:1,9 179:23 billed 176:12 billion 13:1,4 37:18 47:15,20 49:11 63:5,16 64:5 71:3 76:17 76:18,20,25 77:4 83:20 bills 178:9 180:1 180:15 binding 165:3 bishop 2:12 5:21 6:5 170:6,12,14 bit 15:24 92:15 101:6 132:20 172:17 black's 57:2 bloomington 96:9 board 148:16 169:12</p>	<p>boils 176:17 bolingbrook 10:4 bomb 92:15 bona 108:11,13 110:10,14,23 111:11 117:14,16 117:17 131:20 153:24 165:17 bond 183:18 187:15,15 188:20 189:6,14,19 190:2 190:7,13,20 192:21 bonds 77:23 book 64:12 born 13:18 borrowing 38:6 bother 89:12 bottom 39:8 47:17 157:23 boughton 10:3 brainer 107:11 147:15,18 breach 108:18 breached 121:7 break 87:14 brendan 174:24 brewing 178:5 brian 11:16 brief 2:14 3:1 29:19,20 31:7,15 33:17 36:25 70:7 97:16 124:12 134:10 179:20 188:12 191:21,25 192:13 195:13 briefed 65:7,12 115:15 187:22 188:8 191:21 briefing 29:3 38:10 115:5,14 159:4 178:18</p>	<p>briefly 39:6 55:17 166:21 187:7 briefs 42:24 106:12,13 112:5 bring 86:9 108:1 198:17 broad 20:19 32:13 32:19 82:12,22 broader 133:11 broadway 10:10 brought 99:2 bryant 11:15 bucket 145:20,21 buckets 26:9,13 budget 88:20,21 88:23,24 89:3 90:1,10,11 98:6 98:18,25 100:1,20 101:13 102:7,13 102:13 121:1 142:23 150:13 budgeted 120:20 123:1 137:17 build 121:13 building 121:19 121:19 154:12 buildings 116:1 120:14 built 120:25 121:17,18 bunch 142:17 burden 99:14 112:1,4 121:19 125:19 129:24 136:19 165:23 business 33:7 34:18 46:13,24 48:25 49:13 58:25 66:10 69:23,25 70:8,24 72:15,18 76:9 82:1 83:7 154:2 170:12</p>	<p>businesses 131:1 butler 6:17,19,23 174:20,24 buy 49:11 buyer 26:17 29:4 30:7 31:6,15,19 32:2,16 33:15 39:2 49:9,10 76:21 77:2 97:6 99:15,23 161:18 buyer's 29:19 31:24 buying 198:21</p> <tr> <td colspan="4">c</td></tr> <tr> <td colspan="4"> <p>c 8:1 10:20 12:1 88:21 93:3,3 98:13 99:11,14 100:10 104:16,16 104:21,25 105:10 111:8,12 117:8 162:13 163:4 164:15 165:22 167:10 201:1,1 c.v. 75:9 calandriello 9:16 calculated 118:24 120:3 calculating 27:13 calculation 146:1 146:4 165:12 169:11 calculations 167:15 calculus 84:8 calendar 159:8 162:6 call 16:3 28:19 41:8 157:20 173:1 192:9 called 131:8 campus 125:3 129:15,21 152:1 152:11 154:9</p> </td></tr>	c				<p>c 8:1 10:20 12:1 88:21 93:3,3 98:13 99:11,14 100:10 104:16,16 104:21,25 105:10 111:8,12 117:8 162:13 163:4 164:15 165:22 167:10 201:1,1 c.v. 75:9 calandriello 9:16 calculated 118:24 120:3 calculating 27:13 calculation 146:1 146:4 165:12 169:11 calculations 167:15 calculus 84:8 calendar 159:8 162:6 call 16:3 28:19 41:8 157:20 173:1 192:9 called 131:8 campus 125:3 129:15,21 152:1 152:11 154:9</p>			
c											
<p>c 8:1 10:20 12:1 88:21 93:3,3 98:13 99:11,14 100:10 104:16,16 104:21,25 105:10 111:8,12 117:8 162:13 163:4 164:15 165:22 167:10 201:1,1 c.v. 75:9 calandriello 9:16 calculated 118:24 120:3 calculating 27:13 calculation 146:1 146:4 165:12 169:11 calculations 167:15 calculus 84:8 calendar 159:8 162:6 call 16:3 28:19 41:8 157:20 173:1 192:9 called 131:8 campus 125:3 129:15,21 152:1 152:11 154:9</p>											

cancer 195:17	77:2,7,13,13 78:5	105:14,16 106:15	97:18,20,24 98:1
candidly 33:17	78:10,11,12,21,25	107:25 110:16	98:23 100:4,4,7
can't 47:6,22	79:9,17,21,23	111:25 113:13,16	102:1 113:23,23
48:13 49:15 54:3	80:1,5,8,12,16,25	113:22,22 114:6	113:25 114:1
66:15	81:1,6,25 82:7	114:11 115:2	166:7 191:7
cap 57:12 71:3	83:1,10,15,17	117:15,19 137:5,6	catch 32:19
83:20 88:8	84:3,5,18	139:9,12 141:13	categories 23:11
capable 163:18	cardinal 126:11	141:15 150:16	categorized
capacities 184:16	cards 30:18 33:4	157:19 159:1,17	175:17 186:22
capacity 139:22	35:10 48:21,22	160:9 162:16,17	catherine 11:11
capital 9:10 75:6	52:19,22 61:6	163:13,21 164:2	causative 188:13
75:18 97:16 112:1	62:10 76:4,6 81:8	165:13 168:16	cause 13:20
185:1	82:10 83:19	176:13,25 177:3,4	105:14 162:16
card 23:7 28:11	care 189:17	177:5 179:6,14	163:7 189:2 199:4
29:4,7,18,25 30:7	careful 54:17	180:19,23 181:1	causes 7:3 93:20
30:13,23,24 32:6	56:11 151:12	184:21 186:1	106:7 181:22
32:11,13,18,22,24	carefully 43:11	187:6 192:15	causing 85:3
33:1,3,9 35:2,12	55:23 80:13	196:6 199:18	ccar 73:21
35:16 36:1,7,13	122:18 151:13	cases 13:2,25	cede 23:3
36:17,18,22 37:11	caricature 56:3	14:20,22,24 17:22	centerpoint
38:16,20 40:2,6	carolina 176:13	19:3,4 21:14	180:24
40:10,15,25 41:11	176:14	31:19 43:1 51:19	centers 180:7
41:13,17,24 42:6	carried 88:24	108:8,9,9 113:10	cents 135:8
42:18,21,23,25	carry 165:22	115:4,4 117:20	certain 14:17
43:8,12,15,23,25	carrying 180:16	139:8 162:22	16:16 58:2 73:19
44:4,11 45:7,11	cars 113:14	163:20,25 164:1	93:4 98:9 109:17
46:3,7,12,20,21	carved 32:6	179:9,25 180:22	110:15 137:11
46:23 47:2,6,15	186:12	181:2 182:14	151:11 163:25
47:17 48:13,15,17	carveout 79:22	188:12 191:9	164:23 169:1
48:20 49:1,12,14	94:24 95:2 98:7	cash 4:4,11 16:7,9	176:20
51:11,12,22,23	case 1:3 12:8	23:20,22 24:11,11	certainly 19:7
52:17,25 53:4,10	13:10 20:14 21:5	24:16,22 25:13	113:8 139:17
53:18,24 54:1,2,4	31:23 33:6 40:8,9	26:13 27:25 32:8	151:25 178:24
54:8 55:14,24	40:12,13 41:18,25	32:16 39:7,14	198:12
57:5,6,10 59:23	43:9,10,18,19	42:17,18 44:20	certainty 181:9
60:1,3 62:4 63:7	48:25 50:14,15	46:17,20 47:3	certificate 197:3
64:11,24 66:14	52:24 53:10 56:23	65:3 77:18,20,20	certification
67:3 68:5,8,12,14	67:24 69:23 70:8	77:21 85:16 87:11	123:13 156:18,20
69:1,10,12,17,22	70:12 73:12 76:8	87:20 88:14,15,15	160:3 164:25
70:14,19,21,22	78:2,19 80:2 83:6	88:19 90:12,17,21	167:12
71:22 72:3,8,20	91:16 92:15 93:8	91:3,9,16,20	certified 201:3
73:20,20,23 74:1	93:25 98:3 99:3	92:10,13 93:6,10	certify 151:20
75:25 76:3,15	100:7,7,12,13	93:12,15 94:7	152:4,5 156:17

[cfo - closing]

Page 10

cfo 151:2	child 176:24	197:12,17 199:2	125:10,10 127:8
ch 74:14,18	177:5,7 180:10	199:17,21	129:11 130:1,4,5
challenge 149:19	children 142:22	claimant 196:6	131:21 143:7
149:20,22	170:15	197:12	145:3 146:2
chambers 13:20	choice 167:11	claimants 15:8	150:19 159:7
84:22,24 185:4	chose 46:20 191:8	17:14,21 18:21	163:19 164:16,19
chance 78:9	chosen 74:16	claims 7:3,11	164:20,25 165:11
change 31:4 68:13	75:23	12:21,22 14:2,4	165:17 168:13
69:12 123:12	chris 11:21	15:21 16:6,17,22	cleared 37:6,11
124:22,25 185:2	cil 109:23	16:23 17:2,8,11	clearly 13:25 21:8
changed 50:7 92:9	cineplex 180:18	18:1,25 19:5	34:21 38:20 53:18
chapter 13:18	circuit 178:17	20:10 22:5,7,18	68:6 95:3 100:14
14:15,18,19	179:21 180:5,8	25:9 96:19 99:8	102:5 107:11,16
163:21 164:2	181:1 185:25	100:8 102:22	107:24 116:20
166:5 181:9	187:7,13 190:8	106:7 112:3 114:2	123:8 128:3
character 49:21	195:16	133:8 138:21	132:10 164:9,14
50:8 68:13	circuits 180:3	168:16 181:21	179:21 184:23
characteristics	circular 107:14	182:5,11,15 184:3	cleary 8:12 9:2
125:14	circumspect	184:3 185:23	28:19 95:21
characterization	74:19	186:4,6,9 195:22	client 99:15
38:10 98:20	circumstance	198:8,9,18	115:21 135:7
characterize	186:10	clarification	193:21 195:18
17:16 44:20	circumstances	144:19 168:6,18	198:16
charge 51:11,12	92:9 162:23	169:10	client's 100:16
68:5 80:25	166:19	clarified 49:8	106:1 199:5
chargeback 82:21	cite 31:7 43:1,9	62:15 71:13	clients 96:15
chargebacks	50:14 56:9	clarify 29:5 67:18	98:14
34:18,20 57:18	cited 41:18 55:8	68:23 85:14 134:6	clock 14:25 15:1
60:23,25 61:8,14	188:12	159:23	close 38:9 99:18
61:14,15,15 62:3	civil 113:10	clarifying 147:1	113:25 192:9
78:24 79:16 81:13	120:12 187:6	clarity 109:21	closed 59:7,11
charged 52:23	claim 18:17 37:13	155:9	closely 67:3
83:1	39:13,14,14 50:22	clause 32:1 67:4	174:10
charges 33:3	61:25 62:6 66:17	69:23 70:9	closer 68:21 110:8
41:17 42:22 48:21	78:6 101:6,16	cleaners 130:15	152:8
52:18 68:10 70:13	102:1 105:13	clear 45:4 47:11	closing 23:21,23
70:22,22 76:5	110:1 125:19	57:22 74:14 75:22	23:23 33:19,21,25
77:24 81:24 82:9	133:6 135:13	81:10 83:7 87:21	34:9 37:5,8,17,22
83:10	162:15 163:7	96:8,18 97:17	44:21 57:23 58:10
check 71:18	175:7,19 181:7	99:20 102:18	59:16 61:4,14
chicago 9:19	184:1 191:18	107:19 108:20	63:21 66:4,8,11
187:2	192:20 193:1,13	109:20,21 116:3	66:14 67:1 72:7
	196:7,10,13,18,19	118:9 124:23	76:19 82:16 84:7

[closing - conclusion]

Page 11

84:8,9,11,20 88:25 94:10 98:4 101:7 171:5,8,13 172:10 code 73:14 78:7 110:9 164:11 176:1 181:6 collateral 4:2,3,4 4:10,11,11 31:3 44:25 77:20,20 87:11,18,20,25 88:7,14,15,15,19 90:12,17,21 91:3 91:9,20 92:10,13 93:6 94:8 96:9 97:5,18,25 98:1 98:23 99:2 100:4 100:16 101:8 135:13 168:19 183:19 184:13,23 collateralized 188:20 189:6,7 colleague 39:6 56:2 96:1 116:16 137:2 143:24 158:17 colleagues 28:19 104:6 113:15 collect 61:25 collected 149:6 154:23 collecting 149:2 161:20,20 collectively 77:25 colleen 10:17 collier 163:22 colloquially 65:25 colorable 167:10 167:18 column 158:6 come 43:15 53:12 62:10 92:5,9 100:21 101:24	121:13 128:20 135:20 146:19 147:19 168:2 171:19 172:4,6 175:24 176:22 186:16 comes 30:19 35:11 64:16 94:19 100:11 129:16 145:19 160:21 175:15 176:15 comfortable 184:24 coming 17:2 77:8 90:22 93:11 161:21 199:6 comity 111:21 commenced 13:2 162:19,25 163:9 199:13 commentary 51:18 comments 182:2,3 182:3 commercial 74:21 120:15 121:12 commission 181:5 181:8 committee 3:16 3:22 4:7 12:12,19 14:8,9,12,18 16:25 92:23 169:12,12 182:1,2 184:7 common 16:11 78:18 communicated 194:3 communication 172:24 communications 58:24	community 4:18 4:21,25 5:3,6,11 5:13 9:17 10:2 103:13 104:5 161:25 companies 25:12 32:11 41:24 42:6 42:18 45:8,12 46:12,21 54:1 55:14 59:23 60:3 73:20 companies' 60:1 company 14:18 16:6,7,17 21:18 51:23 54:6,9 74:8 74:9 75:2,17 97:6 125:15 129:16 138:10 151:2 153:11 158:12 compare 22:18 compared 139:17 compel 2:3,7,16 3:4,10,19 4:14,19 5:2,16 6:7 73:12 103:10 104:17 131:18 170:6 172:18 competitive 12:13 complaint 19:11 20:24 73:4 93:22 132:22 complete 16:23 23:17 196:10 completed 169:13 completely 67:24 174:16 complex 16:11,19 85:4 compliance 121:6 123:14,17 128:20 134:17,18 148:22 149:3,19 150:25 151:5,10,14,16,20	156:17 160:7 164:23 complicated 108:25 109:3 151:18 complied 107:8 125:6 134:12 156:21,25 comply 91:6 108:23,24 122:11 123:21 125:15 134:17 160:1 161:7 component 166:12 components 40:5 compressed 182:13 compromise 16:17 134:10 compromising 20:10 comrie 74:13 concede 89:6 conceded 111:12 conceivable 32:8 61:23 concept 19:1 39:16,16 concern 31:20 54:24 93:9 102:16 166:1 concerned 22:5 22:18 39:25 concessions 57:14 conclude 35:15 79:7,21 80:15 106:24 164:16 167:4 concluded 200:9 conclusion 79:19 84:14
---	--	--	---

conclusions 116:23 176:23 condition 4:3,10 55:10 58:9,10 87:20 166:8 conditioned 90:9 conditions 58:1 167:19 conduct 127:20 128:9 conference 95:14 172:2 173:1 confidential 54:18 confines 108:15 confirm 21:8 95:22 102:5 149:9 153:14 166:5,6 174:5,8 192:14 193:17 197:8,14 confirmation 18:9 19:5,6 20:18 98:4 100:8 182:12 191:3,16 confirmed 13:10 20:16 24:10 27:18 151:4 191:15 confirming 22:6 conflated 132:20 conflict 160:20 confront 102:3 confusing 186:2 confusion 55:19 congress 107:15 114:7,8 178:16 180:12 conjunction 18:5 173:7 connection 33:5 48:23 70:10 76:7 81:23 170:21 consensual 19:20 19:21	consensually 102:4 consent 90:3 97:18,24 100:5 101:9 102:6 114:6 166:4 consented 90:7 consenting 89:25 90:2 consequences 135:21 consider 13:11 104:21 116:24 165:25 177:14,14 consideration 74:10 169:25 considerations 176:20 177:7 considered 36:6 62:6 80:13 175:18 177:5 considering 14:5 74:19 165:13 consistent 19:14 24:3 27:11 83:8 84:2,25 88:19 151:4 167:24 consolidated 16:2 16:12,21 consolidation 21:20 constitute 41:21 46:21 73:20,23 79:10 80:19 constitutes 79:20 constituting 36:1 construction 74:6 126:11 construed 75:12 consultation 12:11 21:10 76:21 consumer 187:9	consummation 13:18 18:13 contact 95:11 193:20 194:24 contacted 87:23 contained 81:1 contemplate 13:17 contemplated 62:12 83:3 contemporaneo... 150:24 154:2 contend 77:8 106:21 162:7 contends 77:12 81:20 175:11 contest 72:1 contested 73:25 137:18 158:19 context 38:21 75:23 80:15 127:3 127:4,6 165:15 166:13 contexts 14:4 contingency 12:16 contingent 62:6 65:13 continue 13:19 46:13 68:14 90:12 91:19 93:12 129:19 191:10 continued 4:3,11 87:20 continues 125:5 continuing 162:23 contract 6:9 41:10 56:7 74:7,10,14 74:20,23 75:8,12 75:15 108:18,19 108:22,24,24 173:3	contract's 74:20 contracted 74:12 contractor 109:4 125:1 130:10 contractors 109:8 109:9,13 118:8,13 118:14 125:16 130:12 131:1,3 contracts 15:17 31:22 43:3,4,5 59:23,23 75:12 78:1 79:2 177:12 contractual 50:22 contrary 56:6,7,8 89:14 111:21 131:19 165:7 167:6 178:2 180:11 contributed 100:15 control 107:3 165:3 controls 32:19 controversy 75:4 conversations 91:22 converted 68:15 convince 66:25 108:12 convinced 111:7 cook 113:11,14 115:3 124:3 137:3 161:20 187:7 195:16 cooperative 115:6 coordination 18:15 copies 130:24 copy 88:22 167:23 185:4 197:6 core 108:15 132:10 135:12 147:13,15 164:6
---	---	--	--

165:14 corp 74:24 180:19 corporate 152:23 corporation 1:7 3:23 4:16 6:11 12:3 170:4 correct 26:25 28:17 30:20 35:14 35:21 40:4 42:4 46:1 50:7 70:17 71:5,24 88:3,6 97:7 108:14 127:11,25 128:19 138:18,24 139:5 146:13,23 170:10 171:21 197:1,2 198:22,25 corrected 72:5 correction 45:2,6 correctly 62:22 64:18 corresponds 57:4 cory 104:10 cost 21:17 98:3 183:13 187:22,25 188:6,24 189:19 196:9 costs 14:23 17:10 20:14 120:23 145:20 161:12 189:5,16 193:19 counsel 18:2 37:19 49:8 63:4 84:23 103:16 104:9,10,11 109:20 112:11 130:8 131:21 166:18 167:23 173:19 174:6,21 186:25 188:17 189:25 193:7,20 194:3,14,14 195:23 197:6,8	counsel's 115:12 count 57:11 109:4 109:8,8,12 113:14 118:8 123:8,17,19 124:25 125:2,12 126:22 128:5,21 129:5,12,23 131:4 131:13 151:18 153:17,20 154:15 154:16 counted 125:1,2 130:5 149:23 154:2,20 counterproposal 101:3 counting 114:17 123:22 126:16 131:1 151:17 153:19 154:18,24 country 201:21 counts 55:22 county 113:11 115:3 124:3 137:3 161:20 176:14 177:22,25 178:8 187:7 195:16 couple 19:8 21:16 43:1 56:9 67:18 104:7 107:6 129:5 137:14 139:10 155:7,10 176:4 course 13:19 14:13 17:6 31:17 33:7 41:17 42:22 43:13,16,17,23 44:11 48:25 49:4 52:20,21,21,23,24 53:11 54:2,10 56:17,19 67:6,7 69:23,25 70:5,8 70:12,19,21,24 75:14 76:9 81:25 83:7,9,23 119:5	120:24 135:13 149:7 178:10 180:10 181:1 court 1:1,12 12:2 12:7,9,20,24 13:9 13:14,23 14:11,14 17:4 18:1,4 19:4 19:17,22 21:3,24 22:2,16,23 23:4 23:13 24:19 25:8 25:22,24 26:11,15 26:22 27:1 28:7,9 28:15,21 29:2,8 29:13 30:10,15,17 30:22 31:1 34:23 35:15,22 36:8,14 36:20 37:12 38:25 39:4,10,22 40:19 41:2,7 42:2,13 45:15,22 46:10 47:1,5,12 48:2,8 48:16 50:12,20 51:1,7,16,24 52:6 52:14,16,21 53:4 53:13,17 54:8,14 54:21 55:4,12,20 58:6 59:3 60:11 60:18,22 61:5,10 61:17,21 62:14 63:2,10,14,23,25 64:23 65:2,5,7,15 65:23 66:13,18,23 67:15 69:4,19,21 70:15,18,25 71:2 71:6,12,20,23,25 72:4,10,22 73:2 73:11 75:14 85:17 85:21,23 86:8,9 86:15,18,23 87:8 87:12 88:2,4,10 88:11 89:8,11,15 89:17,20,24 90:6 90:14,22,23 91:2	91:8,11,14,24 92:2,4,20,22 93:2 93:14 94:17,19,22 94:24 95:1,11,12 95:15,18,20,24 96:4,6,12,14,17 96:21,24 97:1,4,8 97:10,13,21 98:7 98:9,13,16,24 99:1,17,21,24 100:9,18 101:4,18 101:20,22 102:5 102:11,15,20,24 103:2,5,11,17,25 104:3,20,23 105:2 105:8,10,18,25 106:3,18,21 107:9 107:15,19,23 108:3,6,16,20 109:11,15,23,24 110:2,6,16,19 111:4,6,9,13,18 111:22,22 112:7 112:13,15,17,22 112:25 113:5,5,12 113:17 114:8,10 114:11,14,24 115:2,3,9,17,20 116:2,6,9,12,15 116:18,24 117:1,3 117:6,22,25 118:16,18 119:1,5 119:9,13,18,21,23 120:7,10,16,19,24 121:4,22 122:5,7 122:9,13 123:23 124:1,13,16 125:8 126:15,18 127:1,3 127:5,8,12,22,24 128:1,10,14,17 130:16,18 131:12 131:23 132:2,13 132:16 133:10,12
---	---	---	---

[court - customer]

Page 14

133:15,18,23 134:4,6,14,19,21 134:25 135:1,2,6 135:11,18,20,23 136:6,9,11,16,22 136:25 137:7,9,16 137:21 138:1,12 138:14,15,19,21 138:25 139:3,6,15 140:1,4,8,10,13 140:19,21 141:2,5 141:11,16,18,22 141:24 142:1,5,11 142:19 143:6,16 143:22 144:4,7,16 145:4,6,10,13,16 145:21 146:2,3,6 146:7,10,16,21,24 147:2,4,5,9 148:5 149:25 150:3 151:22 152:12,15 152:18 154:4,14 155:4,12 156:5,16 156:22 157:1,14 158:17,20,23,24 159:7,9,11,13,14 159:18,18,20,22 160:13,15,16 161:16,16,23,24 162:19,24 163:3 163:22 164:3,3 165:25 166:16,16 167:18 168:4,10 168:15,20 169:2,5 169:14,20,22,24 170:8,9 171:20 172:3,15 173:10 173:19,21,24 174:3,6,11,13,18 174:22 175:2,4,11 175:21 176:2,4 178:10,16,20,23 179:1,12 180:11	181:16 182:18 183:3,15,21,25 184:8,11,15,18 185:6,21,24 186:2 186:14,15,18 187:3,7,10,12,17 187:19,24 188:1,9 188:9,11,16 189:6 189:9,17,23,25 190:8,10,12,15,21 191:11,12,21,24 192:2,7,19 193:10 194:1,7,13,18,20 194:25 195:3,9,12 195:16 196:14,19 197:10,16 198:1 198:12,16,19,24 199:1,11,17,20 200:4,7 court's 104:24 145:5 168:18 187:14 188:2 195:19 courtney 11:18 courtroom 186:25 courts 74:19 108:21 110:4 115:6 138:11 159:5 163:24 166:17 176:10,22 180:4,5 181:6 cover 98:3 99:10 187:19 189:5 190:20 coverage 195:21 195:25 196:1,3,4 196:5,8 covered 32:12 77:14 79:24 80:1 86:24 95:2 192:8 covering 133:12 133:14	covers 98:14 176:16 180:10 185:22 187:16 189:11 190:8 crazy 94:3 create 54:24 74:22 121:13 125:25 126:4 created 55:6 127:15 153:8,8 creating 74:21 181:9 creative 147:20 150:17 credit 23:7 28:10 29:4,7,18,25 30:7 30:13,18,23,24 32:6,9,11,13,18 32:22,24 33:1,2,4 33:9 35:2,9,12,16 36:1,7,13,16,18 36:22 37:11 38:16 38:20 40:1,6,10 40:15,24,25 41:11 41:13 43:8 44:4 46:3,7,15,16,21 46:22 47:2,6,15 47:17 48:13,15,17 48:20,21,22 49:1 49:12,14 51:11 52:17,19,22,25 53:4,10,18,24 54:8,20 55:11,24 57:10 63:7 64:2 64:11,23,24 66:14 68:5,8,12,14 69:1 69:3,10,12,17,22 70:2,14,19,21,22 71:22 72:3,8,20 73:20,20,23 74:1 75:25 76:3,4,6,15 77:2,6,13,13,19 77:21,22 78:5,10	78:11,12,20,21 79:9,17,21,23 80:1,5,8,12,16,25 81:6,8,24 82:5,7 82:10 83:1,10,15 83:17,19 84:3,5 84:18 crediting 62:17,19 creditor 50:3 110:10 creditors 3:17,23 4:8 14:17 16:16 20:7 21:14 62:22 98:21 99:7,8 100:2,3 110:12 114:5 166:5 182:1 182:2 184:7 creditors' 12:12 creditor's 14:17 16:25 credits 77:23 78:24 crew 129:7 crisis 91:15 critical 57:14 59:2 116:14 124:4 126:5 128:25 129:22 159:2 177:20 199:7 critically 57:4 cro 151:2 cross 119:2 crucial 13:7 cure 15:17 173:6 current 31:12 58:22 78:24 86:10 86:14,24 currently 31:9 39:2 56:22 162:7 customer 33:4 48:22 51:23 52:18 76:5 81:24 82:9 82:20
---	--	---	---

customers 42:7 52:22 81:8 cut 179:19 cutty 174:24 cynic 156:9 cypress 74:24 cyrus 9:10 17:15 17:24 96:2,15 97:16 99:15 101:6	201:25 dated 2:17 daucher 10:20 dave 195:11 david 10:24 11:23 day 15:22 38:22 63:19,20 99:16 102:8 109:20,21 151:17 168:3 173:9 186:16 187:12 199:12 days 13:1 15:7 16:24 53:11,12 57:8,8,9 67:12,12 85:19 88:25 102:9 102:11 112:12 113:7,11 115:16 136:8 139:10 166:22 de 7:2 181:21 182:11 183:9 deadline 171:9 deadlines 15:10 deal 16:12,14 17:19,19,19 18:15 34:13,14,19 35:13 38:9 49:13 64:2,4 72:12 89:12 94:12 95:25 103:4 118:10 136:24 144:10 dealing 14:1 54:9 93:16 103:12 110:11 115:4 149:7 161:6,19 186:3 195:4 deals 20:7 157:19 dealt 19:3 104:24 109:23,24 111:17 debate 128:25 debating 109:18 debt 48:12,14 185:1	debtor 1:9 6:7 8:4 16:13,13 19:20 26:18 30:7 44:21 49:4 63:5,6 64:5 78:19,22 81:13 82:7,18 83:3 94:14 104:17 105:4 107:1,4,16 107:17 112:2 115:23 138:6,14 164:21 165:8,15 165:18 170:17,20 170:21 171:4,9 172:18,25 173:1,4 175:8,11 176:7 192:22 193:19 debtor's 164:7,9 164:22 165:19 171:12 174:11 175:15 176:24 181:19,24 182:18 188:16 195:20,23 debtors 2:1,15,21 3:2,8,17 4:3,8,10 4:14,19,20 5:1,9 6:1,13,21 7:1,3,17 12:5,11,19 19:13 20:6 21:4 23:6,16 24:4,7 26:4,10 27:4,12,17,22 34:4,16,21,22 35:25 37:17,19,22 38:1 39:3 40:11 40:15 41:23 44:3 46:5,19 47:16,18 47:19 55:8 59:5 60:14 62:15,23 69:3 71:16 72:24 73:12,16 74:2 76:5 77:8 78:21 79:18 81:4,7,9,22 82:9 84:15,21 85:2,12,14 86:3	86:12 87:20,22 88:13,18,24 89:1 89:4,5,23 90:9,12 90:16 91:6,13,16 91:17 92:6 93:6 97:19,25 98:6,18 98:22,23 100:3 101:1 103:8,9 106:21 108:12 112:4 113:3,22 132:4 160:24,24 161:1 162:5,7 166:1,6,8 167:24 173:18 181:20,22 182:10,13 183:10 185:12,13,13,17 186:13 187:21,24 188:6,19,21,25 189:5,16 190:22 191:1,8 192:12,14 193:2 196:9,12,17 196:21 197:4,17 198:3 199:22 debtor's 17:5 19:18 23:1 49:8 63:4 december 148:14 148:16,22,24 192:5 decide 22:20 92:17 100:18 113:5,5,18 135:11 167:18 168:15 decided 26:6 60:4 74:4 113:7 124:21 132:13 164:20 168:4 169:24 179:21 deciding 168:1 191:24 decision 117:20 127:9,10 148:23 148:24 159:6
--	---	---	--

167:6 168:18 177:11,20 decisions 110:4 187:23 declaration 28:13 28:22 33:16 34:9 37:20 58:3,4,15 85:2 88:23 104:18 133:7 137:22 158:4 169:25 declaratory 86:8 dedeaux 6:9 172:18,22 default 31:4 44:24 defeating 164:14 defend 189:16 197:21,22 defendant 195:17 defendant's 195:20 defendants 13:25 defending 188:7 188:13 defense 83:13 89:23 117:22,24 187:22 189:5,16 189:18 193:18 196:6,9 deference 111:19 127:19 deficit 121:16 123:1 define 30:7 67:5 defined 30:24 48:18 63:15 73:21 76:2 79:11,24 88:20 94:22,24 117:16 defines 32:22 33:1 68:4 75:25 77:17 definitely 143:22 definition 29:7,18 30:9,13,25 32:6	32:13,18 33:8,10 38:19 41:10,12 42:5,8,9,20 44:6 46:3,5 51:8 52:11 53:24 56:13,23 68:1,7 69:22 77:15,15 78:4,6,7 79:6,22 80:12,18 82:8,12,23 83:6 84:3 definitions 43:1 definitive 163:18 del 74:9,14,18 75:2 del.super. 75:1 del.supr. 75:7,10 75:18 delaware 43:10 68:3 74:6,7,15 75:11 81:3 82:23 delaware's 80:20 delay 116:3,10 167:1 183:13 191:18,19 198:18 delayed 55:16 delaying 115:22 delivered 58:8 59:12,14 delivering 37:23 delta 24:15 27:22 delve 168:14 demand 13:6 37:14 demanding 121:6 demonstrate 29:16 43:2 69:1 125:6 131:11 demonstrated 37:19 demonstrates 33:25 demonstration 131:20	denied 191:13 195:3 deny 85:8 181:17 department 127:14 138:20 departure's 25:25 depend 198:15 dependent 121:12 depending 110:13 144:12 161:16 167:13 171:15 depends 137:5 151:24 180:8 depose 119:5 deposit 29:24 35:17,18 36:2 40:2 46:20 64:15 64:20,21 70:5 77:16,17 79:7,20 79:25 80:10 83:16 deposition 119:7 139:23 150:20 depositions 139:21 deposits 30:5 32:9 35:13,24 37:2 47:10 77:19,19,22 78:1 79:11,23 80:6 depriving 64:13 derived 46:22,24 48:12 52:12,13 describe 29:21 described 30:3 78:20 describing 70:13 designated 76:23 designating 173:16 designation 173:14 designed 65:4,18 65:19 100:5	desire 191:7 desperately 122:24 despite 124:22,22 detail 40:22 156:24 157:15 180:20 determination 103:24 160:15 165:3 191:17 determine 44:10 109:7 110:23 111:1,2 134:11 145:13 157:25 166:7 192:10 198:2 determined 27:24 82:21 determines 117:1 determining 67:25 69:14 develop 119:15 developed 161:9 195:18 developer 125:13 125:14,16,25 167:14 development 106:10 125:4,23 127:7,15 129:19 130:2 developments 12:8 diagnosed 198:23 198:24 dialogue 101:1 155:7 dictionary 57:2 didn't 17:19 39:8 47:2 58:24 66:22 147:11,12 difference 39:13 39:16 40:23 53:13
---	--	--	--

[difference - doesn't]

Page 17

182:21 189:10 different 40:24 45:22 49:19 59:17 59:19 67:24,25 68:21,25 75:4,5 77:14 82:7 98:18 110:16 114:16 140:8 153:1 176:22,22,22 177:13,16 difficult 15:11 106:24 157:23 difficulty 21:18 diminished 97:14 diminution 97:5 dip 88:13 89:5,8 91:4 92:13 95:4 95:25 101:12 182:24 direct 146:15 165:11 167:16 194:21 directed 194:2 direction 17:10 145:5 146:6 159:7 directly 70:10 176:11 177:4 directs 160:9 disagree 27:4 82:11 107:22 124:16 130:8 149:12 disagreement 91:8 disappears 156:2 157:11 discharge 197:8 discharged 196:20 disclosed 17:3 disclosure 14:19 14:25 18:8	discounts 79:1 discover 43:7 45:1 45:2,3,5 46:18 78:17 discovered 194:4 discovery 119:6 136:4 139:23 140:2,7,13,22 167:2 198:9 discreet 186:11 discrepancy 157:6 discretion 188:3 discretionary 139:3 discuss 14:12 24:23 95:14 135:21 discussed 22:17 32:14 97:3 135:25 171:22 177:7 181:2,25 discussing 23:8 177:11 discussion 16:5 19:2,15 20:25 91:12 152:17 discussions 14:16 16:16 17:15 18:2 24:25 28:18 95:23 171:15 dismiss 114:19 dismissed 106:16 dispositive 55:18 disputable 68:10 dispute 24:13 31:6 34:12 36:12 41:5 46:19 48:7 59:16 60:19,20 65:12 75:9 76:11 79:8 80:4 92:10 107:17,20,20 108:4,4,10,11,13	110:11,14,22,23 111:2,3,11 117:14 117:22 131:20 138:3,4 142:24 146:10,14 150:6 153:14,24 158:15 164:17 175:15 disputed 77:6,6 77:13 78:5,10 115:13 160:6,11 disputes 20:1 77:11 86:4 139:23 169:14 disputing 106:5 106:19 121:6 174:7 disregard 44:4 dissipated 101:8 distinction 27:2 40:10 80:5,5 108:20 distinctions 56:12 distinguish 50:24 distinguished 179:17 distress 54:7,10 54:15 distribute 148:18 160:14 distributed 105:4 150:9 160:8 distribution 142:25 district 1:2 4:18 4:21,25 5:4,6,11 5:14 9:17 10:2 67:23 103:14 104:5 105:3,5,6 106:6 111:17,25 112:19 115:1,25 116:24 117:10 120:13,13 121:25 122:17,25 123:2	139:10 140:18 142:2,18 143:11 143:18,19 144:13 145:16 146:12 150:7 153:25 159:24 160:2,10 160:11,11 161:25 162:24 163:3 165:4,7 168:22 180:11,19 district's 103:16 118:7 145:24 154:14 districts 121:11 156:7 157:12 164:11 169:1 dizengoff 3:22 docket 13:21 40:14 document 2:5,5 2:12,18,19,23,23 3:5,6,12,14,21,23 4:5,12,12,16,24 4:25 5:2,4,7,9,14 5:21,23 6:2,5,11 6:13,19,21,23 7:4 7:7,12,17 19:11 28:14 29:1 131:7 131:11 156:17 documentation 24:5 27:13 124:17 130:23 155:13 158:4 documents 4:23 28:25 78:2 128:24 130:9 139:20 151:1,3 154:17 155:16 156:20 doesn't 31:4 32:10 35:13,18 47:12,18 48:2 63:14 67:11
--	--	--	---

[doing - employees]

Page 18

<p>doing 21:17 47:24 61:21,23 100:20 115:7,7 148:7 152:9 154:21 156:10 182:20 dollar 135:8 dollars 24:16 25:7 47:16 121:15 122:24 166:12 184:18 donuts 130:15 don't 13:20,24 15:9 16:9 20:19 22:19,23 26:17 27:3 39:22 44:11 45:8,18,20 46:10 46:16,19 48:6 50:4 51:19 53:16 54:14 55:18 57:16 58:22 60:7,9,20 61:7,11,19,24,24 63:2,12,24 65:12 65:16 66:13,23 147:9,14 doubt 25:17 122:11 136:6 downside 182:19 draft 15:7 drafted 32:3 40:18 56:20 92:6 114:7,8 138:8 drafters 56:11 drain 1:22 dramatic 192:14 192:25 dramatically 158:12 draw 56:11 drawn 40:10 77:21 drive 94:2 driving 13:8 15:2 20:20</p>	<p>drop 129:10 dropped 73:7 122:20,21 123:10 dropping 122:18 drops 129:2,5 drove 109:16 dry 130:14 drye 170:11 due 27:19,22 31:5 31:13 35:1 40:7 41:12,21 44:20 55:25 56:3,10,12 56:13,17,19,22,24 57:2 62:7 67:9 68:18,19,20,20,20 68:22 69:3 74:1 76:14 79:1 82:16 82:17,17 83:20,21 83:22,24 84:1 86:4 171:19 175:1 177:23,25 178:1 dunkin 130:15 duties 59:10 74:23 dyslexia 176:6 d'aversa 10:21</p>	<p>eastern 67:23 easy 100:18 169:3 economic 106:9 125:3 127:7,15 129:18 ecro 1:25 eda 105:3 106:8 106:11 107:8 118:21 124:5,10 126:3 129:2 130:1 133:3,4,20 134:12 138:7,8 142:15 143:3 150:25 152:9,14,17,20,25 153:17,20 154:22 155:25 156:7 157:8 161:3,5,6,7 161:17 162:8 164:19,23 165:6 edge 138:7 152:17 152:20,22 154:22 edition 163:22 edny 181:4 education 121:20 123:2 edward 4:4 8:24 87:16 effect 74:22 84:21 114:11 156:1 161:6 167:22 effective 13:14 effectively 20:5 49:11 91:5 111:23 efficiency 139:13 efficient 86:6,13 134:24 135:6,9,11 137:14 efficiently 15:12 21:6 111:23 141:9 effort 59:14 efforts 198:1 eight 181:18</p>	<p>either 56:2 72:19 81:14 90:23 93:3 114:20 137:9 179:22 election 115:4 159:1 element 33:10 42:1 159:16 elements 41:10,14 55:24 104:22 105:20 111:8,12 118:12 eligible 148:4 email 37:25 58:14 84:21,24 151:10 151:11 193:22 emails 37:19 embrace 38:21 empire 6:10 172:18 empire's 172:22 employ 126:18 152:22,25 153:4 employed 20:5 150:23 153:3 employee 15:23 122:12 125:12 126:22 128:20 employees 20:5 109:4,5 119:25 120:1 122:19,25 123:7,8,22 124:7 125:1 126:14,17 126:21,24 127:7 127:21 128:4 129:3,5,6,12,17 129:23,24 130:4 130:10,10 131:4,9 131:13,15 134:13 147:22 149:22,23 150:22 151:13,23 152:1,6,6,10,12 152:13,14,23</p>
	<p>e</p>		
	<p>e 1:21,21 2:9 5:18 8:1,1 10:23 11:6 11:13,20 12:1,1 90:24 193:3 201:1 earlier 18:14 19:24 32:21 123:11 155:9 168:24 175:19 early 32:21 123:10 148:13 earmarked 143:4 earned 51:9 52:1 80:23 82:25 easier 22:9,20 easily 154:11 east 10:3</p>		

[employees - exhausted]

Page 19

153:16,17 154:5,7 154:8,9,12,15,17 154:19,20,25 155:3 157:17,20 157:21,22 158:2,5 158:7,13 165:11 167:16 employer 193:17 194:9,12 employers 125:2 125:17,17,18 128:6 129:14 131:14 employing 125:20 enacted 128:11 encompass 82:15 ended 23:21,24 37:6,9 91:3 ends 69:22 enforce 2:1,15,22 3:2,9,17 23:1,12 28:14 38:25 85:15 86:10 enforceable 57:21 57:23 67:10 enforced 65:9 enforcing 90:23 engage 61:2 128:9 english 177:24 enhanced 100:15 enjoin 112:22 enter 60:14 181:24 199:23 enterasys 74:13 entered 40:13 88:11,22 91:7 106:10 187:8 entertainment 111:17 180:19 entire 80:15 83:2 88:8 153:17,20 184:14	entirely 57:21 entities 16:9,9 74:21 125:20 131:4 entitled 35:25,25 36:16 50:3 64:1,5 71:14 76:11 91:20 91:21 109:7 147:3 entitlement 58:19 58:22 entitles 36:12 entitling 105:18 entity 16:7 126:20 164:22 entry 7:1 181:20 envision 71:2 epitome 109:21 equal 31:11 35:7 76:20,25 equals 44:7 equivalent 118:13 118:14 120:1 158:13 192:22 eric 10:20 escrow 73:9 77:19 170:22 171:10 esl 9:3 17:25 33:19 34:2,7,14 37:20 38:23 95:22 95:25 96:13,18 97:5 esl's 18:2 38:1 especially 74:20 136:15 essence 41:23 171:20 essentially 172:9 175:14 182:4 establish 74:16 established 69:24 establishes 155:8 estate 2:3,11,17 3:4,11,19 4:14,19	5:2,20 6:4 12:17 15:16 18:11 19:18 19:25 20:9,11 25:14,19 26:13 28:3 62:12 73:13 93:11 103:10 107:3 108:2,19 132:11 137:15 154:8,10 164:9 170:6,12,14,15 181:7 184:4,5 estates 15:4,11 20:15,21 144:18 152:1,11 153:5,10 153:17 154:11 162:9 164:9 182:13,18 estate's 13:8 estimate 22:7 114:14,22 141:14 estimates 13:4 estimation 18:3 22:13 estoppel 135:13 168:19 et 3:23 12:3 evan 11:2 eve 29:5 139:9 evening 20:24 87:24 174:17 event 62:2 103:20 138:21 eventually 53:19 161:22 everybody 14:21 16:18 everyone's 120:1 everyone's 21:15 evidence 28:12 29:1 37:21 75:22 111:21 118:19 119:2 139:15 141:8 151:8,15	167:17 182:11 evidencing 78:2 evidentiary 119:14 137:12,16 137:19 139:17,18 172:5 187:12 exact 126:8 exactly 22:15 26:20 37:16 60:16 65:4 68:24 85:20 86:17 97:22 100:21 109:23 115:7 189:24 examine 28:24 119:3 example 43:11 51:5 117:20 159:2 167:2 178:2,2 181:3 exceeded 37:18 exceeds 21:18 35:6 47:15 76:18 excess 37:7,23 38:14 77:7,8 exchange 196:9 excluded 35:9 64:10 65:24 71:14 77:1,9 182:24 excluding 76:14 exclusions 13:3 exclusive 19:13 exclusively 69:6 106:7 excuse 25:1 93:4 150:4 151:2 executory 15:17 exercise 61:13 107:3 151:18 exercised 59:8 66:4 82:2 exhausted 196:1 197:5
--	--	---	---

exhaustion 197:3 198:5	expertise 136:25	106:19 108:15	64:2 80:3 89:2
exhibit 55:2 88:21 131:7	explain 33:20 91:18 110:4 112:6 118:4,6 131:5	109:18 112:21 115:13 116:22 117:1 120:6	92:11 93:3,24 102:8 122:2 123:1 140:7 149:1
exhibits 195:25	explains 31:8 64:1	131:18 132:6	198:15
exist 55:15 102:22 182:12	explanation 36:9 124:4 196:3	136:20 139:9	fashion 102:2
existence 129:21	exposure 199:6	153:12,16 155:25	faster 112:6
exists 61:13 74:22 75:3 91:7 120:22 131:21	express 31:8,9 51:4,5 128:6,8	156:12 158:11	favor 160:24,24
expand 128:5	extend 128:15	164:21 165:1,5 172:6 178:12	fear 45:6
expect 16:23 102:3 115:15	extension 89:3,5 89:12,20,25 147:10	179:5 180:3 196:4 196:24	february 27:10 62:10 85:15 88:24 142:14
expectation 59:22	extensive 20:3	factor 36:5 138:2	feder 174:24
expectations 17:5 74:12	extensively 78:15	factors 165:22 195:19	federal 105:17 111:21 138:20,23 163:7
expected 150:13	extent 35:5 37:13 74:11 76:17 78:3	facts 22:20 47:22 47:23 54:5 59:19	federalism 111:21
expediate 196:12 196:17	79:15 84:17 85:6 85:9 89:4 100:9	67:25 106:22 110:13 111:1 168:4	fee 6:18 192:6
expedite 159:18 159:19 167:1 169:13 181:24	101:10 102:22 109:17 110:15 147:1 165:10	factual 22:2 109:12	fees 12:16 78:25 78:25 79:16 140:18 187:11,13 187:14,20 189:13 189:21,23 190:2,7 190:13,13 192:8
expedited 25:6 28:8 115:4,14 158:22 159:4,4,8 159:16 166:18,23 167:3,20	192:21 196:20 197:11,17	fail 123:9 190:25 190:25	fell 68:1 134:17
expend 189:16	extra 83:23 114:1	failed 123:21 165:5	fennell 6:10 172:21,22 174:4,8 174:12,15
expenditures 90:10	f	fails 67:13	fide 108:11,13 110:11,14,23 111:11 117:15,16 117:18 131:20 153:24 165:17
expense 7:11 76:21 99:7,8 113:24 114:5 166:4 175:18 185:11	f 1:21 8:10 201:1 f.3rd 180:7,25 f3rd 57:1 face 82:22 161:22 165:12	fair 86:21 98:20 110:6 122:7	fifth 8:5
expenses 6:15,18 7:9 77:24 100:6,6 100:14 114:4 166:3 174:21	facility 38:3 54:20 55:11 70:2 82:5 121:9,18 173:8	fairly 62:6 75:4 99:18 166:2 192:9	fighting 34:24 143:18 161:4
expensive 14:22	fact 21:2 29:17 30:3 31:2,4,6,7 32:23 33:10,14 37:5 44:16 47:25 54:3 68:25 70:1 73:23 79:24 80:19 82:3 84:7 85:5 89:14 101:1	faith 160:7	figure 26:3 43:6 60:24 61:2,8,9,12 61:20 66:15 110:3 118:2 168:25 169:4
experience 16:11		fall 29:6,17 30:8 42:8,9,19 43:8 80:12 134:17 135:3 177:2 185:19	figures 165:8,10
		fallen 34:13	
		falls 32:17 79:6 108:14	
		familiarity 198:10	
		far 22:4,18 25:3 27:14 33:14 39:24	

[file - frankly]

Page 21

file 17:20 20:20 20:23 61:24 86:8 86:20 87:1 89:18 93:21 149:13,17 173:20 193:15 filed 2:10,18 3:5 3:13,21 4:4,15,24 5:3,13,19 6:10,18 7:11 14:18 29:4 49:20 78:14 91:22 105:21 106:14,17 106:19 112:21 113:10,14 117:10 132:22,22 134:2 139:9,12 162:3,5 163:6 168:16 193:7 195:16 198:16 199:17 filing 17:20 45:21 91:18 115:9,17 134:5 173:18 final 68:23 88:12 150:18 166:20 182:24 finally 19:9,23 20:22 161:3 finance 169:12 financial 54:6,7,9 54:15 58:9 financing 88:13 find 117:15,18,19 117:19 176:19 finding 193:3 findings 116:22 fine 35:18 37:12 39:22 51:24 86:25 87:13 88:10 95:5 95:15 103:25 132:2 136:13 152:7 166:3 194:1 194:25 fines 78:25	finish 14:24 finished 13:10 firm 12:16 firmly 18:7 firms 12:11 13:6 13:17 first 12:10 15:7 21:17 22:25 33:11 33:18,22 34:3 35:8 36:17 38:9 39:1 40:3,13 41:10,15 43:7,11 43:20 44:12,23 46:4,14,14 49:19 49:20,22,23 50:17 54:17 55:9,21 56:10 57:4,16 58:11,13,14,17,25 59:1,3,5 60:7,8,11 60:13 62:23 64:7 67:18 69:5,7,11 69:16,24 71:21 73:4,9 76:20 77:9 77:12 78:17 82:2 83:10 88:14 102:14 103:20 104:21 105:21 111:16 115:25 121:23 123:23 134:5 155:10 159:25 175:7 177:11 181:8 182:10 183:21 186:23 197:23 fitzgerald 10:22 10:23 five 57:8 88:25 121:15 135:8 142:15 170:5 176:2 182:20 184:18 fixed 27:8 56:25 67:11,13	flawed 30:3 flexible 71:17 flies 122:19 flip 103:18 floor 10:10 florey 10:6 104:9 109:19 114:23,25 114:25 115:19,24 116:4,7,11,13 118:4,4 120:9,12 120:18,22 121:3,5 122:3,6,8,10,14 123:24 124:2,15 124:17 125:9 126:16,19 127:2,4 127:6,10,13,23,25 128:2,12,15,18 130:17,22 157:14 159:23 169:9,17 flow 104:19 flowing 34:20 85:8 flows 30:17 focus 15:3 17:18 40:5 41:9 42:21 42:22 141:2 147:9 147:11 163:20 179:7,15 focused 178:19 focusing 80:3 folks 104:7 172:6 follow 145:9 185:22 196:15 followed 115:11 following 12:13 14:16 34:12 76:12 149:2 176:15 force 107:4,17 foregoing 76:18 201:3 foremost 159:25 forget 117:22	form 42:18 49:12 63:5 199:5 formal 43:18 79:1 173:20 formally 84:22 167:22 173:2,17 former 39:19 193:21 194:3,14 194:14 forms 64:16 forth 35:1 166:22 forum 107:4 163:1,9,24 forward 21:9 90:13 91:10 99:9 107:6 133:8 188:5 196:7 198:9 found 77:16 176:25 179:8 four 41:9 57:8 104:12 121:15 159:3 fourfold 170:17 fours 84:1 fox 4:4 8:24 87:16 87:16 88:11 89:10 89:13,16,19,22 90:4,8,15 91:5,10 91:12,17 92:1,3 92:19,21 93:9 95:17,19 99:1 184:8,10,12,17 185:4 frame 117:9 163:21,25 164:1 framed 107:6 frankly 21:14 29:14 73:5 86:13 88:8 95:1 149:14 157:7 172:8 177:19 182:16 183:13
---	---	---	---

[fraud - go]

Page 22

fraud 187:9	158:15	furnished 43:25	116:17 117:5,7
free 47:11	front 14:8,9 15:3	further 2:22 3:11	118:22 119:4,7,10
fresh 20:8 87:6	18:4 19:4 58:4	171:16 189:1	119:16,19,22,24
friday 173:13	86:7,9 104:12	furthermore	155:6 156:6,11,19
friedman 103:7,7	141:8	189:3	156:23 157:3
103:12 104:1	fruit 13:3	future 17:22	genuine 150:6
friedmann 8:8	fulcrum 183:16	28:23 48:10 56:22	getting 13:6,6
23:3,5,6,14 24:21	fulfill 74:11	81:13 151:14	15:3 20:20 121:1
25:10,23 26:8,12	full 92:14 101:17	168:17	139:7 150:8 152:7
26:20,25 27:9	118:12,13 120:1	g	158:19 183:13
28:10,18 29:2,11	131:16 152:6,10	g 4:24 5:3,13 12:1	gianis 10:25
29:14 30:12,16,20	152:23 154:18,24	80:24 145:12,17	give 25:4 34:7
30:23 31:2 35:14	155:3 158:1,13	181:16,16	39:23 65:22 67:8
35:21 36:4,11,15	179:23	gallagher 10:24	67:22 82:19 85:10
36:24 37:15 41:18	fully 130:19	195:10,11,13	86:15 113:17
42:24 44:14 57:14	187:22 188:8,20	196:16 197:1	115:8 118:4 120:2
60:6 67:17 69:9	191:21	198:7,14,22,25	130:23,24,24
69:20 70:6,17,20	functionally	199:3,15,19 200:1	156:24 157:5
71:1,5,9,16,21,24	117:14	games 124:20	158:24 160:2
72:2,5,11 132:1,3	fund 114:4 142:15	gansburg 120:8	161:14 176:18
132:3,15,17	161:9	120:11 131:24	183:17
133:11,14,16,19	fundamental	134:9,15,20,22	given 22:8 24:17
134:1,5 135:24	68:13 79:13 94:6	135:1,3,10,16,19	31:17 72:25 77:20
136:10,12,19	132:10	138:3	80:2 85:7 88:7
137:2,8,20,24	fundamentally	garrett 190:25	120:24 127:18
138:2,18,24 139:1	30:2	gathered 143:10	155:16,17 167:17
139:5,7 140:3,5,9	funded 49:24	151:3	173:25 174:2
140:12,17,20,24	161:10	general 50:2 81:3	182:13,23 184:25
141:4,6,17,19,23	funding 99:3	128:4 129:22	gives 45:12 56:23
141:25 142:3,8,13	121:20 123:2	163:2	169:8
142:20 143:14,20	funds 25:5 41:1	generally 74:16	glad 54:25 172:16
143:23 144:5,15	45:5,9,11 46:6	136:24 162:21	glance 181:8
147:16 148:7	47:23,24 49:21	179:25	glb 64:8,9
150:2,4 151:24	50:11 51:6 55:7	generated 46:7	glitch 41:8 94:1,2
152:13,16,19	64:21 79:7 80:15	gensburg 9:16,21	global 17:14
154:6,16 155:5,11	85:3,5 105:4	104:4,5 105:5,9	gmg 75:6,18
156:14 168:5,24	122:16 132:24,24	106:2,4 107:5,13	go 15:21 30:25
169:3,7,18,21,23	133:2,4,20 143:3	107:21,24 108:5,7	34:14,18 38:5
friemdann's	149:3,14,21	109:14,16 110:3,7	44:12 48:17 59:10
39:21	157:12 164:18,22	110:18,20 111:7	69:16 73:2,3
friends 140:6	165:23	111:10,15 112:9	83:19 87:14 92:4
frivolous 108:10	fungible 100:23	112:16,19,24	104:25 106:4,15
108:10 117:14,25	100:24 101:10	113:1 114:13,23	107:4 110:17

[go - heard]

Page 23

112:6 113:18 124:9 126:9 135:16 137:15 142:2,6,12 143:7 143:8,11,12 144:12,13,21,23 147:7 149:3 155:23 156:5,11 160:4,5 161:4 168:22 169:11 171:15 175:4 179:22 180:3,5 188:5 191:17 195:25 196:22 gob 22:9 76:22,23 goes 33:20 63:5 97:13 129:5 142:16,17,17 145:3,19 149:16 156:2,6 157:12 160:22 168:25 169:4 180:20,25 going 15:5,25 17:10 18:9 20:14 28:16 34:18 57:17 58:4 61:9 62:2,3 66:10,24 72:15,18 87:6,12,13,24 88:8 90:12 91:10 93:16,17 94:7,11 95:8 99:9 100:21 105:9 107:22 109:19 111:10 112:20 114:15,16 115:14,24 116:21 116:22 120:19 121:15 123:12,18 123:19 124:25,25 126:9 128:9 129:14,14,15,19 133:7,12 139:14 139:16 140:17,23 141:8 144:12,13	149:1 151:11 155:9,22 159:15 160:16 167:11 168:20 171:4 172:10 173:19 174:1,2 176:21 177:8 179:19 181:17 184:5 186:16 189:19 190:1 192:7,10,11 194:20 195:4 198:9,9,14 199:21 gold 11:1 good 12:2,4 17:1 23:5 64:4 87:16 90:1,7 100:25 104:4 113:17 114:25 121:24 160:7 165:15 170:2 172:21 174:23 180:6 185:9 187:1,3,4 195:10,12 goodhouse 174:23 174:24 175:3,5,14 175:23 176:3,6 178:14,17,22,24 179:6 181:15 goods 33:5 48:24 70:11,23 76:7 185:12,16,16,18 gotscal 132:4 gotshal 8:3 12:5 23:6 103:8 170:3 188:19 190:25 gotten 27:14 63:11,12,15 72:18 137:4 144:9 gottlieb 8:12 9:2 95:21 govern 74:6 75:24 108:21	governance 18:19 governed 78:11 138:17,20 grade 178:24 grant 50:20 84:14 131:18 185:2,11 granted 45:15 173:25 182:23 gravity 15:10 great 18:15 156:23 157:2 greenville 176:14 grew 121:19 grounds 67:14 77:12 82:21 group 10:9 grow 120:23 guarantee 120:4 188:1 guess 47:5 61:23 65:25 93:17 107:21 109:17 112:10 118:2,16 120:8 133:7 136:1 136:1 137:5 138:15 157:1 169:19 182:15 guidance 166:15 guided 107:12 guys 155:23 169:15	handy 178:13,14 180:7,10 hanging 13:3 happen 15:5 34:2 116:22 139:14,24 143:16,18,22 happened 59:15 91:5 139:11 144:1 148:15 160:12 happening 25:11 37:4 happens 71:12 145:22 148:10 192:15 happy 25:12,18 28:4 51:20 92:1 92:19 94:5 102:12 103:1 137:24 140:6 hard 97:14 113:23 157:18 harm 199:4 harris 187:1,2,4 187:18,21 188:12 189:10 190:5,11 190:14,18 191:20 192:4,18 hasn't 25:2 60:11 hassle 183:13 hate 67:20 haven't 63:12 hawaii 170:15 172:6 hawaiian 170:9 headquarters 152:24 heads 161:15 head's 39:24 hear 101:12 116:15 146:11 172:9 188:16 heard 19:6 57:16 60:14 73:4 103:20
--	--	--	--

[heard - hypothetical]

Page 24

138:12 142:22 172:12 190:16 hearing 2:1,7,14 2:21 3:1,8,16 4:1 4:7,14,18 5:1,6,9 5:11,16,23 6:1,4,7 6:13,15,21,23 7:1 7:6,9,14,14,17 15:1 18:9 22:17 23:8,10 25:1,7 28:16 29:5 32:15 34:13 60:9 73:17 86:14 103:16 115:10 119:14 136:2 137:12,17 137:19 139:18,18 139:19 159:5 162:24 170:20 171:1 172:6 187:12 192:16 heavily 120:14 121:11 164:21 heavyweight 179:14 heavyweights 178:20 held 32:10 35:24 39:2 41:20,24 42:10,17 43:7 44:18,23 49:10,21 49:22 51:6,14 57:15 69:6,10 73:19 78:12 79:7 79:9,14 81:16 85:5 133:20 135:15 142:24 150:9 162:7 164:8 165:23 168:22 helped 29:5 herring 80:10 hey 94:14 high 127:19	higher 70:3 highlight 40:3 hire 93:19 history 128:23 129:1 130:4 hit 124:21 151:19 hits 192:22 hoffman 144:18 152:1,11 153:5,10 153:16 154:8,10 162:9 164:8 hold 49:5 59:14 60:25 71:25 73:16 77:10,11 80:9 81:12 159:16 168:12 176:25 holdco 2:2,4,16,19 3:1,3,6,8,10,13,19 3:20 5:23 8:13 23:2 81:20 82:6 83:14 84:23 85:2 85:11 86:3,12 161:18 holder 183:18 holders 18:17,18 88:15 holding 25:20 33:12 42:14,16 66:6 69:7,11 149:14 161:19 170:4 holdings 1:7 3:23 4:15 12:3 hollander 11:2 holohan 11:3 holste 11:4 homes 121:19 hon 1:22 honest 71:16 honestly 93:14 honor 12:4,5,10 12:23 13:16 14:6 14:8,10,15 15:19	19:23 20:22 21:22 22:15,25 23:5 29:2 30:20 32:5 32:14 35:21 36:15 37:16 38:18 39:5 39:7 40:1,21 42:4 44:19 46:1,11 47:8 48:6 49:18 50:14 51:15,18 52:3 53:3,16 54:12,25 55:13 56:10 57:3 60:14 61:1,7,11 62:21 64:18 66:7 67:2 67:16,17 68:24 71:1 72:16,23 73:8 85:13,20 86:6,25 87:9,16 87:19 88:3,6,11 89:19 90:5,8 91:17 93:9 94:5 95:9,19 96:5 97:7 97:12,15,17 98:12 98:15,17 99:13,19 99:25 100:17,24 101:10,21 102:10 102:16,21,25 103:7,23 104:4,6 104:12,20 105:1,5 105:9,23 107:5,21 108:13 109:17 110:11 111:15 112:3,5,9,16 114:13 116:17,25 117:8,13 118:3,7 118:16 119:17 120:8 131:24 132:3 133:17 134:9,23 135:17 138:24 140:24 142:14 143:15,23 144:17 146:9,13 147:8,17 150:11	150:21 153:23 155:5,6 157:7 158:5 159:23 161:2,8,14 168:5 169:9,17,18 170:2 170:10,13 171:22 172:5,8,14,17,21 172:23 173:12,23 174:2,8,15,19,23 176:25 181:23 183:2,11 184:10 184:17 185:3,9 186:17,20,21,23 187:1 188:18,21 189:3,10 190:6,25 191:1 192:18 193:4,6,14 194:12 195:6,10,13 197:2 197:21 198:6,7 199:25 200:1 honor's 109:19 116:22 142:20 honor's 24:25 hoops 131:12 hope 13:11 14:4,7 172:11 hopeful 17:16 21:25 168:17 173:6 hopefully 13:9 14:4 137:13 hour 172:25 hours 37:21 137:14 186:15,19 house 121:16,17 housekeeping 175:6 houses 121:13 hundred 129:6 hundreds 15:22 hyde 7:25 201:3,8 hypothetical 61:2
--	---	---	---

[i.e - insolvency]

Page 25

i	impact 192:24	167:2	169:25 178:12
i.e 97:13	impasse 22:12	inclusion 83:14	187:14 192:9
i.e. 45:24 74:2	implement 84:15	income 48:19 76:2	195:19 196:6
81:15 162:10	implemented	121:9	200:6
163:22	106:11	incorporated 16:4	individual 139:22
idea 113:17 120:3	import 186:1	incorporation	194:10
130:8 153:5	important 27:1	82:13	indulgence
157:25	45:19 53:9 57:4	increased 170:16	104:24
identified 25:8	114:1,1,7 120:6	increasing 183:12	industry 7:10,12
72:7	126:3 160:1 166:5	incurrence 83:9	185:8,10
identify 131:14,14	166:10,12 168:8	indenture 4:2,9	inf 57:4
identity 131:13	importantly	87:18 94:3 96:6	inform 157:18,21
ignore 22:4 41:6	128:23	96:10 99:2	157:25 159:12
ignoring 73:18	impressed 200:7	indentured 182:9	168:19
ii 2:3 3:20 4:20	impression	183:17,18,19	information 33:20
il 9:19 10:4	110:21 113:4	independent 67:8	33:22 34:3,8,10
illegitimately 79:9	improvement	85:11	58:9,16,25 80:25
illinois 106:8,9,11	180:7	independently	84:6 154:22
106:15 107:8	inadvertently	27:4	193:21 194:24
111:14 113:7	198:18	indicate 66:6	197:7
120:23 121:11	inappropriate	196:1	informed 130:19
127:19 128:5,7	110:24	indicated 170:7	171:3 173:1,2
132:17 136:7,13	incentive 117:12	indication 129:11	186:12 197:6
136:18,22 137:15	incident 189:4	indications	initial 2:14 16:23
138:11,17 139:16	193:18	123:21	17:15 18:2 23:15
139:25 141:9,16	include 32:10	indiscernible	24:8 29:19 31:7
152:24 166:14,16	165:10 167:15	12:17 14:9 21:23	injunction 113:16
187:8,9,10,24	183:9,17 190:10	22:3,13 24:23	132:21
188:9 191:12	190:12 196:8	25:14,21 26:14,21	injunctions 136:3
195:15 199:2	included 32:13	27:11,16,19 28:1	injunctive 112:14
imagination	83:17 88:22	28:13 31:16 32:1	112:17
158:16	104:15 128:24	32:20 33:11 37:20	injury 14:3
imagine 16:18	152:10	39:6 49:6 51:20	inland 6:10
49:15,19 61:1	includes 30:23	55:22 59:9 66:24	172:18
93:19	51:10 69:2 80:24	72:20 77:22 81:1	innoval 193:19
immediate 81:18	103:19 133:4	82:18 95:16 104:8	194:4
179:16	152:11 190:13	104:10 110:10	inquiries 15:22
immediately	including 4:3,11	112:1 116:20	inserting 68:18
25:16 28:3 53:23	15:16 17:24 18:21	119:17,19 123:17	insider 99:22
56:3 57:11,21,22	19:3 47:14 58:12	127:2,16 130:20	insistence 142:21
67:10,12 68:19,19	77:20 78:16 84:16	131:6 133:22	insofar 84:15
68:20 82:17 83:21	136:18 142:18	140:24 142:23	insolvency 99:6
83:23 84:1,10	143:1 152:8 155:3	143:21 144:21	

instance 43:7,18 44:23 46:12 50:5 50:10 57:25 87:2 148:11 193:19	190:9,18 interested 146:11 interesting 92:24 128:25	invokes 55:9 involuntaries 110:17 involuntary 110:9	165:21 167:13,14 168:2,7,11,21 169:5,16,24 173:6 176:23 179:4,10 179:21 186:6,12 187:11,20,21 189:18,21 190:6 195:19 197:8,19 198:7
instances 48:14 57:6	interests 20:10 165:4	involve 113:14 132:23	issued 48:23 76:6 138:11
instruction 72:25	interim 23:9	involved 92:24 96:17 105:6 144:8 144:9 187:25	issuer 48:21,23 49:3 76:4,7
insurance 74:8 75:2 189:3,9 192:23 193:16 194:4,9,15 195:5 195:21 196:8,11 196:21,23,23 197:4,12,15,18	intermediate 158:20 interpret 43:4 75:14 106:13 interpretation 56:7 73:15 77:12 83:8 84:2 125:21 127:18 128:22 160:18 175:25 177:12	involves 73:25 106:6,8,9 ionosphere 50:15 ira 3:21 irrelevant 111:1 169:20 178:5 isn't 42:13 51:11 64:1	issues 15:17,23,24 15:24 19:15 20:12 21:1 25:18 41:5 85:14 86:1,2,7,11 86:18,24 99:12 100:16 103:13 104:23 106:7 109:10 113:1,19 115:6,12,13 117:9 132:10,11,19 134:15 135:7,12 163:2 164:17,20 166:20 167:10,18 167:19 168:19 169:22 172:12
insurer 193:17 197:6,24	interpretations 75:5 interpreted 126:23 127:14 128:22	issue 16:12 19:3 23:7 28:11 29:6 34:6 36:19 39:11 39:24 40:2 41:3 44:19 65:7,17 69:6 73:14,25 74:3 79:19 80:9 80:11,16 83:5 85:4 87:21 90:23 94:6,9 102:6,8 105:25 106:3,5,17 106:20,24,24 107:12,12 109:6,7 109:12,24,25 110:14 111:18 112:21 113:2,2,4 114:16 118:10 123:23,23 128:19 128:21 130:21 133:17 135:14,24 138:4,10 140:8,10 141:17 142:6 148:10 151:18 158:14 160:14 161:17,22 163:20 164:8,16,18,24	issuing 177:10 it'd 130:13 italian 119:20 item 22:25 47:14 87:10 170:4 172:17,20 185:7 193:5 195:6 items 35:6 47:14 76:17 77:25 103:9 137:18 173:6 it's 13:3 14:11 15:5,11,19,20,21 15:21 16:2,3,19 18:3,23 21:11,12 22:2,10,20 26:8
intangible 41:15 41:16,22 42:1,3 42:20 48:18 76:1 80:20 81:2,3	interpreting 74:10 interrogatories 139:21 interrupt 25:22 51:7 120:16 intertwined 31:22 introduce 104:7 inventories 76:14 inventory 35:1,8 37:9 38:2,3,5,6,14 64:7,8 66:8,9 72:13,13,19,21 76:11,13,13,21,22 76:24,25 inventory's 64:19 investments 9:3 75:6,19 invoke 55:16 invoked 55:14		
intangibles 42:10 42:12 52:5,8,9			
integrate 13:12			
integrated 31:25			
integration 32:1 67:4			
integrity 16:20			
intend 28:19 129:23			
intended 23:24 180:14			
intensive 20:13			
intent 56:18 74:17 129:12			
intention 129:9			
inter 16:6,17			
interest 12:7 17:4 18:18 21:10,11,12 21:15 45:4,8,12 50:11,19 88:16 111:19 160:20 184:24 187:16 188:22 189:12			

26:16,21 32:5,12 36:1 38:12 39:19 40:14 41:25 42:13 42:17,17 43:2,19 43:24 46:24 49:13 49:16,17,23 50:1 50:15 51:16,16,24 51:25 52:1,12,14 53:2,17 54:18 55:7 56:7,25 58:16 61:23 62:3 62:11,12 63:14 64:13,15,23 65:3 65:9,11,15,18,19 65:23 66:18,23,24 66:25 147:13,15 ivan 11:1 i'd 41:6,9 43:1,9 45:13 51:20 56:9 i'll 23:3 24:23 28:25 40:22 i'm 14:21 20:25 26:1 29:14 39:2 40:12 48:16 52:1 54:25 55:4 58:4 61:5 i've 18:1 45:13	130:3 153:2,8,8 164:24 165:5,10 165:11 167:15,15 joinder 3:16 4:7 joining 95:4 journal 181:10 judge 1:23 19:19 86:21 93:1 103:1 114:25 115:1,24 120:12,18 121:3 123:3,6 126:5 131:17 146:15 160:18 168:24 169:23 177:4 178:10 179:6,13 179:13,15 180:5 180:21 judging 163:18 judgment 86:9 115:11 136:3 137:4 187:8 192:5 judgments 191:5 judicial 127:9,10 july 20:16,18 166:9 170:17 jumped 107:6 june 74:18 75:1 171:23 199:11 jurisdiction 105:16,17,19 111:4 138:23,23 162:20,21 163:1,9 164:5,6,7 165:14 178:19 jurisdictional 163:8 jurisdictions 127:20 128:8	kamehameha 170:13 kamlani 34:8 58:3 kamlani's 33:16 58:15 kanter 9:16 katherine 11:13 keep 61:22 86:1 87:13 116:21 154:11 169:7 184:15 189:2 keeping 150:24 keeps 169:6 kelley 170:11 kelly 11:6 ken 104:9 114:25 kenneth 10:6 kept 60:5 68:18 121:19 138:7 154:7 key 17:24 21:10 36:5 48:12 68:8 70:7,22 101:20 175:25 179:10 kick 125:7 kicked 122:22 kid 121:14 kids 121:13,14 153:9 kimberly 10:25 kind 149:13 173:17 179:2 191:23 kinds 181:25 183:12 kleist 11:6 knew 72:8 152:3 178:4 199:3,9 know 12:14,18,25 13:3,4,5,8,19,24 15:6,7,8,20,21,22 16:1,1,10 17:11 18:3,24 19:5,24	20:3,16,17,22 21:1,19 27:3 28:4 29:11 39:8 57:16 61:19,23,24,24 65:16 66:13,25 67:20 71:8 72:17 84:8 86:1,8,8,10 86:12 87:2,3,4,6 89:2 92:8 93:5,21 94:10,17 95:5,6 95:24 97:8 98:4 100:11,11 106:14 107:9,25 108:8,8 108:16,23 110:5,8 111:17 113:8,10 113:13 114:16 117:1,20 118:6,16 118:24,24 119:19 119:25 120:4 132:25 134:11 135:8 136:2,14,23 136:25 137:1,2,8 141:1 146:1 148:11 150:14,19 153:11 154:19 155:21,22,23,24 156:4,8,11 157:4 157:10,16,18 158:10 161:23 168:8 177:9 182:16 193:8 194:14 knowing 62:7 115:22 known 199:4,9 knows 120:4 136:2 koch 11:7 kosson 11:8 kreller 9:14 97:15 97:15,22 98:8,12 98:15,17,25 99:13 99:19,22,25
j	j 8:17 10:24 11:3 jacqueline 8:9 170:3 james 185:9 january 75:7 143:2 jared 8:8 23:5 103:7 132:3 jeffrey 195:7 jelisavcic 11:5 jennifer 10:19 job 15:20 61:22 180:6 jobs 123:14,17 126:1,7 127:17	k k 178:3,6 195:16 196:20 197:13,22 kadish 4:24 5:3 5:13	

100:17,24 101:5 101:19,21,23 102:10,12,16,21 102:25 krieg 56:25	117:19 131:18 138:4,5,6,17,20 150:16 157:19 162:15,15 163:6 165:13	173:8 legal 16:7 135:12 140:17 186:11 201:20 legislation 106:9 106:14 109:20 152:21 153:1 legislative 128:23 129:1,11 130:4 181:8 legislature 128:5 legitimate 108:11 150:16 legitimately 79:8 lehane 2:11 5:20 170:8,10,11 171:21 172:4 lenders 89:5,8 91:4,4 92:9,13 95:4,5 98:21 length 180:15 letter 46:15,16 58:13 155:12 156:21 198:4 letters 13:6 32:9 77:19,21,22 157:4 160:6 let's 15:8 41:7 49:19 51:4 52:3 leukemia 199:6 level 20:15 129:10 158:18,18 164:24 165:19,20 levels 130:7 leverage 95:7 115:23 levied 124:8 147:25 148:11,11 149:21 levy 124:5,5,10,10 161:19,22 lewis 8:17 39:5	lexington 8:21 lexus 180:19 181:3 liabilities 56:17 61:15 74:23 liability 54:5,6 56:13 liable 130:11 liberty 8:14 9:4 9:11 lien 45:15,23 49:17 50:20 88:14 88:16 90:19,19 94:13 96:7 98:21 101:13 184:22 185:1 lienholder 96:19 lienholders 95:23 liens 96:19,25 182:23 lift 187:5 190:23 193:11 195:7,14 196:22,22 lifting 193:1 197:10 light 37:5 84:14 lii 11:10 likes 17:9 likewise 30:9 liman 8:17 39:5,5 39:20 40:1,20 41:4,9 42:4,17 45:17 46:1,11 47:4,8,21 48:6,11 49:18 50:13,24 51:4,15,18 52:3,7 52:15,20 53:3,6 53:16,21 54:12,16 54:25 55:6,13,21 58:7 59:5 60:13 60:20 61:1,7,11 61:19 62:1,21 63:9,12,18,24
l	laws 74:5 lawsuit 199:14 lawyer 136:22 lawyering 150:17 lawyers 67:20 136:24 150:14,15 lays 52:24 95:1 lead 18:9 79:20 165:20 leading 12:15,15 15:3 learn 84:7 learned 37:10 175:8 198:20 learning 151:12 lease 2:8 5:17 6:8 129:17 130:24 171:2,4,7 173:15 173:16 176:9,10 176:15 177:24 178:1,8 181:13 leased 20:6 64:8 76:22 leases 130:24,25 leave 65:22 86:18 100:22 102:7 103:23 131:22 169:16 183:11 leaves 80:11 83:5 83:13 100:22 165:21 196:4 leaving 85:18 97:19 led 118:23 ledanski 7:25 201:3,8 left 18:19,22 93:12 170:14		

[liman - march]

Page 29

64:18 65:1,3,6,11 65:18 66:3,17,20 67:2,16,19 68:17 72:23 73:3 liman's 69:4,21 limit 106:25 109:4 109:9 179:25 limitations 90:18 93:2 198:8 199:2 199:13 limited 7:6 64:6 93:10 153:15,16 154:24 191:7 limiting 46:8 limits 90:9 lincoln 41:25 67:19 line 17:4 39:8 157:23 183:8 191:24 lines 14:3 lingering 54:5,6 link 61:12 liquid 33:14 liquidate 191:18 liquidated 191:4 liquidating 192:20 liquidation 34:15 list 130:11,25 173:11 listed 47:14 59:12 listen 94:10 lists 32:7 literally 15:22 172:25 literature 199:5 litigated 136:5 litigating 135:7 litigation 18:13,22 20:12 21:13 93:18 114:11 150:10 163:14 168:14,15	187:6 188:13 193:12 198:11 litigations 114:2 191:2 little 56:15 107:14 108:25 110:20,21 120:12 132:20 157:15 172:17 live 28:16 153:9 lived 153:9 llc 2:2,16,19 3:3,6 3:10,14,19 6:17 6:19,23 8:13 74:25 75:6 174:20 llc's 3:1,8,20 llcs 2:4 llp 8:3,12,19 9:2,9 97:16 loans 16:13 local 121:9 122:16 122:21 126:4 128:15 located 194:15 location 76:23 locked 192:2 loews 179:14 180:18 logical 179:2 long 108:17 114:3 136:1,17 137:1 145:2 146:5 152:2 155:25 longer 23:25 91:7 114:19 150:23 167:8 192:8 look 42:25 43:4 43:10 45:10 46:4 47:8 50:19 53:8,9 54:16 55:1 56:13 56:15 57:19 58:10 58:13,15 60:2 67:2 75:21 84:5 96:12 98:6 100:10	100:13 106:12 108:8 110:4 111:1 113:20 123:4,7 124:17 126:10,12 131:17 135:16 145:12,17 157:19 158:3,10 163:23 180:1 181:12,16 190:1 looked 61:3 94:9 117:22 177:4 looking 69:1,17 94:14 149:20 150:11 156:10 179:8 198:5 looks 73:6 lose 128:19,19 129:10 191:12,19 loser 109:22 loses 126:7 losing 151:13 loss 198:17 lost 191:23 lot 22:11,20 34:20 41:5,5 73:6 88:9 92:7 102:19 113:13 133:11 137:9 147:18 151:13 153:9 158:11,14 180:8 180:13 184:18 lotempio 11:11 lots 96:21 louder 140:15 low 13:2 lowe's 179:17 lower 43:18 129:5 luckily 151:1 luftglass 11:12 lunch 158:1	m m 4:4 8:24 10:6 11:1 macy 177:4 macy's 180:11 181:1 main 12:6 180:13 mainoo 2:18 3:6 3:13 maintain 77:21 125:25 126:5,5,6 126:7,13,18,21,23 128:2 153:2 165:5 maintained 40:16 126:14 164:24 167:15 maintaining 130:3 majority 179:25 180:4,4 181:2 maker 10:17 making 50:5 68:17 90:9 193:3 198:1 man 96:2 158:22 159:1,10,12,14,21 200:5 management 23:22 24:11 184:21 mandate 19:14 mandatory 104:21 132:7 135:2,4,14 139:4 139:14 141:2 147:11 162:13,14 164:15 165:14 manges 8:3 132:4 170:3 191:1 manner 100:5 112:3 march 23:16 24:3 24:13 27:12,23
--	---	--	---

[march - mineola]

Page 30

29:5 75:10 89:6 101:2 marcus 8:9 170:2 170:3 172:16 173:12,22 174:1 174:19 181:18 183:5,20,24 184:1 185:3,7 186:21 margin 166:2,3 marietta 75:16 mario 186:24 187:5 market 12:15,15 marshaling 100:4 mart 178:3,6 197:13,22 mart's 196:20 martin 75:16 marts 195:16 massey 11:13 master 173:7 materially 92:9 materials 75:17 75:17 154:25 mathematics 169:3 matt 104:4 matter 1:5 2:4 3:12,21 28:12 35:18 63:14 85:7 85:25 104:21 105:18 106:18 108:13 112:11 113:6 116:19 135:12 137:3 152:3 155:7 166:17 167:4,7 170:7,21 177:8 187:11,25 188:2,5 188:8,8,10,25 191:25 194:3 200:2	matters 7:14 29:15 30:6 32:22 104:12 106:5 111:23 135:19 159:9 183:12 186:21,22,24 matthew 9:21 11:7 74:17 maudlin 174:20 174:24 mauldin 6:17,19 6:23 178:2 mccloy 9:9 mckool 185:10 mean 22:16 30:5 40:8 47:5 49:7 53:17 63:3 65:6 66:25 79:25 86:15 86:19 90:2 91:10 91:13 93:15 94:17 95:24 96:6 99:1 101:14 107:16 113:16 117:16 120:20 126:24 133:15 134:6,8 140:10 141:14 144:10 146:11 149:12 156:17 157:2 158:13 173:24 174:9 177:17 183:16 184:23 189:18 197:22 meaning 29:25 30:6 31:17 32:24 67:8,9 74:4,16 75:23 76:4 80:17 83:5,25 176:18 177:24 meanings 75:5 177:17 means 42:15 51:8 53:15 56:3,5 75:9	80:22 81:3 101:14 126:18 meant 99:5,10 108:1 126:13 178:16 190:5 measures 116:7 mechanic 16:5,20 17:21 18:4,6 19:10,16 mechanism 30:18 35:11 62:17,19 95:2 mechanisms 46:17 68:25 mediation 2:5 3:12,21 meet 92:16 109:9 113:3 meeting 148:16 148:22 meghji 104:18 118:24 120:4 130:19 151:2,7 157:17 meghji's 137:22 150:20 member 166:14 memorandum 2:21 mention 18:24 62:8 mentioned 32:21 44:15,19 72:11 199:23 mentions 155:11 mercury 67:19 mere 156:12 merely 75:8 78:16 83:24 165:2 merit 142:10 merits 113:18,18 166:20 167:11 168:15	messing 142:16 met 37:17 38:15 38:15 77:5 104:22 105:20 112:4 132:8 method 165:12 methodology 119:11 157:24 metro 57:1 michael 10:13 11:14 144:17 157:10 michelle 11:20 middle 148:13 milbank 9:9 97:16 miles 125:2 million 17:8 24:4 24:8,12,12,14,15 27:12,16,18,20,21 27:22,23,25 28:1 28:2 33:12,12,23 34:4,10 36:9,16 36:18 37:7,10,23 38:2,13 39:2 47:16 59:16,21 62:2 69:3,12,15 69:20 71:5,18,18 72:6,7,11,19,20 72:21 73:9 87:3 98:19,23 101:7 141:20 145:18 153:6 156:1,2,7 157:9,11,12 166:12 170:19 182:6 183:2,6,7 184:5,18 mind 60:8,10,17 110:21 116:21 129:3 mindful 20:14 minds 22:1 mineola 201:23
---	---	--	--

[minimal - need]

Page 31

minimal 188:7 minimis 7:2 181:21 182:11 183:10 minimum 152:23 minutes 63:3 misquote 58:6,7 misquoted 58:3 missed 196:14 mistake 121:23 misty 131:6 misunderstood 45:7 189:25 mittelman 11:14 modify 104:14 105:22 modifying 70:9,9 moment 24:23 32:4 33:24 34:4 44:20 45:20 52:4 59:6,15,20 62:5 100:2 147:10,11 monday 186:16 monetary 51:9,11 68:4,7 80:22 81:4 81:7 money 22:11 26:18 27:3 28:6,6 31:13 33:25 34:20 34:22 35:25 45:24 46:21,22,23 49:4 50:7 54:22 57:7,7 58:19 61:13 65:10 69:6 79:19 80:9 80:11,19 81:7,10 81:12 100:21 112:23 115:21,24 116:4,5,13,14 117:11,11,21 121:1 122:1 123:3 134:7 135:14 143:1,7 144:10,10 144:11,20,21,23	145:3,23 147:7 149:16 150:10,15 151:21 157:9 160:17 161:19 164:7 166:11 168:21 184:19 188:22 moneys 191:5 monies 26:9 41:23 42:10 43:6,24 50:18 54:1 57:24 58:8 160:8 monitoring 122:18 monsanto 195:17 montgomery 180:25 month 148:21,23 148:25 151:5 198:12 monthly 150:25 months 93:21 114:19 159:3 167:8 177:3 187:23 192:25 199:22 moot 103:21 169:20 173:21,25 morning 12:2,4 23:5 114:25 morrison 67:19 morristown 41:25 motion 2:1,4,7,15 2:22 3:2,9,11,17 3:20 4:1,8,14,19 4:20 5:1,6,11,16 6:7,15 7:1,9,10 23:1,12 28:14 73:12,14,18 84:15 85:9,15,24 86:10 86:14,24 87:11,15 87:19 88:1 91:18 91:22 93:11 95:4	99:3 103:9,13,18 103:21 104:1,14 104:15,16,18 105:12,21,21 109:16 112:14,17 114:19 115:11,18 117:10 118:15,23 131:18 132:18,18 132:19,23 133:24 134:2 137:12,21 149:13 161:25 162:3,6,10,10,11 162:12,14 163:5 168:14 169:18 170:5 172:13,17 173:21 174:20,25 175:7 177:11 181:17,19 182:7 184:13,20,20 185:2,8,11,14 186:10,24 187:5 191:8,13 192:10 192:13 193:3,5,7 193:12 194:6 195:4,7,9,14 198:19 motions 113:10 113:13 115:9 136:3 181:19 motivated 166:1 motorist 74:8 mouth 190:4 movant 95:3 132:8 164:11 165:21 187:4 movants 166:18 166:25 167:19,21 move 12:6 28:12 87:6 93:7 140:25 196:7 moved 23:11 133:16 134:2 153:12 185:11	moving 13:7 21:5 21:9 24:1 25:6 28:7 31:7 133:21 multiple 31:22 124:11 196:2 municipal 104:9 104:11 128:7 municipalities 142:18 149:16 municipality 142:25 mutual 51:17 81:12,21 mutually 81:16 n n 8:1 12:1 201:1 name 99:10 named 19:10 names 130:12,12 131:2,3,3 narrow 133:17 national 4:1,5,9 7:6 8:20 87:17 nature 53:8 79:16 81:14 84:12 137:5 near 17:22 nearly 21:8 99:4 necessarily 13:20 25:11 30:5 71:13 82:15 156:12 158:12 188:14 necessary 15:4 22:4,5 123:2 153:18,20 need 21:7 25:7 28:23 39:22 42:1 44:11 45:2,9,13 45:18,20 46:13,15 52:7 53:25 66:9 69:16 75:21 84:10 84:22 102:18 104:23 111:1 115:5 116:4
---	--	--	---

<p>117:11 119:1 125:10 130:22,23 132:7,8 134:11 136:23 142:23 155:9 159:2,15 167:22 184:6 193:3 needed 117:11 122:24 needs 28:5 62:16 158:14 163:20 164:2 165:15,16 184:19 negotiate 22:11 194:17 negotiated 38:24 64:3 97:23,24,25 negotiating 171:6 negotiation 16:19 18:23 95:7 negotiations 18:20 neighborhood 101:7 neither 28:19 81:17,22,23 92:6 153:24 net 43:24 44:1 62:3 networks 74:13 never 72:25 106:16 125:1,1 138:12 153:3,18 155:15 167:12 nevertheless 82:18 new 1:2 8:6,15,22 9:5,12 10:11 20:9 74:22 86:18,20 87:1 124:5 news 17:1 nice 99:10 121:25</p>	<p>night 172:25 nodding 140:4 non 16:2,12,21 19:20,21 107:1 154:7 nonbankruptcy 163:24 noncompliant 156:2 noncore 163:11 nonemployees 157:20 nonresidential 176:9 normal 183:7 normally 92:7 northern 75:2 108:17,17 110:25 northstar 10:9 notable 32:5 note 43:10 78:15 177:10 179:10 181:4 193:6,14 noted 81:6 160:2 notes 14:21 176:24 182:9 195:24 nothing's 139:11 notice 7:14 20:23 119:7,8 173:15,20 183:12 184:6 185:2 noticed 41:18 183:9 184:21 notices 173:18 noticing 183:7 notion 40:10 41:12 58:21 62:8 62:11 67:9 68:22 97:17 136:7,13 147:14 notwithstanding 83:14 107:18,18</p>	<p>novel 123:11 november 88:12 105:23 117:10 175:1 199:8 null 75:16 number 20:24 21:7 24:14 25:18 35:8 62:3 69:15 77:7 87:4 100:25 103:9,12 104:6 118:12,13,20,20 129:6 145:2 151:19 152:3,5,8 158:7 167:13 170:5 172:20 174:19 181:18 191:2 193:22 numbers 17:12 57:16 120:3 123:6 124:21 130:9,11 142:16 152:2 154:1,4,6 176:4 number's 62:2 numerous 20:7 ny 1:14 8:6,15,22 9:5,12 10:11 201:23</p>	<p>87:22,25 103:22 149:13 165:2 182:7,8,22 183:8 193:15 195:20,21 195:24 objections 182:10 objective 75:11,13 163:23 objectives 177:14 obligated 31:9,11 36:21 obligation 31:14 42:15 46:7 48:1 50:9 51:9,12,16 51:22 52:9,11,12 52:13,17,23,25 53:9,10,18,19,25 55:6 56:16,21,25 58:25 62:25 64:20 67:11,13 68:5 78:19 80:22 81:4 81:5,7,12,18,21 82:6,15,16,18 85:11 171:14 176:15 177:21,22 178:7,8 179:8 180:9 obligations 2:8 5:17 31:12 47:24 51:17 52:10 56:16 57:18 68:7 81:20 88:16,17 113:23 113:24 171:18 176:7 obscure 131:13 observations 21:17 obtain 77:20 88:13 197:5 obtained 187:15 obviously 13:11 14:11 21:4 40:17 82:22 94:11</p>
		<p>o</p> <p>o 1:21 12:1 77:16 79:11 201:1 o'brien 75:1 o'neal 95:21,21 96:3,5,8,13,16,18 96:23,25 97:2,7,9 97:12 oberg 11:15 object 60:4 182:25 objected 155:13 184:22 objection 4:7,8,19 4:20 5:1,9,23 6:13 6:21 7:6,17 28:22</p>	

[obviously - override]

Page 33

113:16 146:10 168:3 172:7 175:16 178:19 184:19 occurred 185:15 october 191:23 offer 143:20 offered 134:10 offhand 146:1 office 154:10 174:9 official 3:16,22 4:7 offs 24:24 26:9 offset 17:9 26:13 45:25 49:17 oh 108:5 142:13 151:10 okay 12:2,9,24 13:9,23 14:14 19:22 21:3,4,24 22:16,23 23:4,13 26:11 28:9,15,21 28:25 29:13 30:22 35:22 36:14,20 37:12 39:4,20,22 52:6 55:12,20 60:18 67:15 70:18 70:25 71:12 72:22 73:11 85:21 86:21 87:8,12,14 88:2 88:10 92:3,20 95:12,18,20 97:9 97:13 99:21,24 101:4,22 102:20 102:24 103:2,25 104:3 105:2,8 106:4 107:23 108:6 109:15 110:18,19 111:9 112:25 114:24 115:20 116:12,15 117:6 119:1 120:7	124:1 125:8 128:1 128:14,17 131:23 132:2,6 135:18,23 137:7,20 138:1,25 139:6 140:19 141:4 143:6 144:4 145:10 146:3 147:2 155:4 156:22 159:20 161:24,24 170:1,9 172:3,15 174:3,18 183:20 184:8 185:3,6 188:11,16 189:17 190:21 192:18,19 193:10 194:1,25 196:25 199:1,11 200:4 old 63:19,20 66:2 201:21 older 73:10 oldest 35:9 36:13 36:16,18 47:17 49:12 58:12 62:24 62:25 63:7,8 64:11,24 69:14,15 69:18 71:23 77:2 77:8 olga 8:10 188:18 omneon 75:10 omnibus 139:19 192:16 199:12 once 50:8 60:24 64:21 65:1 82:20 153:13,18 156:1 157:11 172:8 199:16 ones 63:8 69:7 142:6 ongoing 15:15,25 18:20 19:25 86:4 100:14 open 16:6 18:19 18:22 85:18 86:2	86:11 91:13 100:16,22,22 169:16 operate 35:17 111:22 operating 66:10 129:7,21 operation 36:3,5 83:18 84:4 operations 15:15 121:12 operative 30:10 30:12 40:4 80:3 opinions 138:11 180:12 opportunistic 150:7 opportunity 182:25 oppose 185:13 191:8 opposed 26:23 27:5 45:23 54:23 84:1 114:21 192:24 opposite 31:20 124:15 opposition 131:19 option 46:12,16 oral 159:5 188:2,3 188:4,6,10,23 192:1 order 7:1 14:10 15:4 36:15 38:8 39:1 40:13 41:13 44:9 46:13 60:7 60:15 61:12,19 64:17 65:21 84:21 84:22 88:11,12,18 88:22 90:9,11,16 90:24 91:7 94:9 95:25 97:2 101:12 103:18,23 115:11	145:2 163:2 167:21,23 168:7 168:11 169:13 172:1 176:8 181:20 182:24 184:21 185:4,22 186:3,5,7,9,12 188:5 193:2 194:2 195:1 ordering 192:1 orderly 171:8 orders 188:9 ordinary 33:7 41:17 42:22 43:13 43:15,17,23 44:11 48:25 49:4 52:20 52:21,23,23 53:11 54:2,10 56:17,19 67:6,7 69:23,25 70:5,8,12,19,20 70:24 74:15 75:22 76:9 81:25 83:6,9 organization 78:25 original 105:19 129:18 172:13 originally 106:19 185:11 ought 86:19 116:21 outcome 22:8 outgrowth 86:23 outset 87:21 outside 126:9 166:9 outstanding 88:17 175:10 overage 72:7 overall 14:1 16:2 177:14 180:23 181:12 override 101:15 102:2 177:15
--	---	---	---

<p>overstaying 65:20 owe 27:4 42:15 45:24 49:4 51:3 81:7,10 117:21 owed 2:10 5:19 26:9,15,16 27:16 27:24 33:2,14 34:1,22 41:16 42:13,21 44:7 48:3,3,7,9,13,14 48:20 51:12 52:17 53:14 56:6 68:16 68:20 70:14,18,20 70:21 76:3 79:15 79:17 81:14,16,21 82:7,18,20 84:1,7 owes 51:2,2 78:18 81:13 84:19 owing 26:1,4,18 26:24 27:22 31:13 84:11 owned 64:9 76:23 o'neal 9:7 o'neill 17:9</p>	<p>180:17 189:7 192:21,23 papers 41:18 44:6 73:5 86:16 94:20 160:2 175:6 paragraph 30:10 30:11,12,17 33:17 33:21 35:17,19 40:15,17 44:8,12 163:22 paragraphs 45:10 paramount 111:19 parents 153:9 park 158:25 parol 75:21 parse 43:11 part 26:18 36:6 38:16 64:12 65:2 67:5 77:9 84:12 95:23 120:1 127:22,24 131:9 131:16 134:23 148:13,13 154:15 154:16,20 169:5 175:20 184:11 191:4 197:16 partial 85:23 175:9 particular 19:2 61:12 83:19 141:13 164:2 168:21 180:9 188:19 particularly 58:23 80:2 99:14 137:21 180:22 parties 12:7,14 17:4,11,12 18:10 20:8,17,22,25 21:10,12 22:10 28:15 37:22,25 38:17 40:21 47:1</p>	<p>51:13 73:18 74:12 74:17,24 75:9,20 75:23 80:13,18 81:17 84:5 85:18 86:10,19 87:4 93:4,23 94:7,13 95:4 100:19 102:6 113:17 114:17 118:20 124:14 126:24 127:20 130:3,25 140:1 145:1 149:7,10 151:23 159:11,14 160:13 166:16 171:24 173:4 177:16 178:18 179:7 181:9 184:24 198:15 parties' 59:17 partner 23:3 partners 9:10 75:6 party 19:21 29:3 42:11 51:2,2,2,3 75:13 81:17 85:6 107:1,16 125:17 127:16 138:13 160:10 162:8,14 183:9,12 184:2,22 185:2 193:8,17,25 194:9,15 195:5 party's 19:10 pass 52:3 passed 16:22 patrick 10:22 11:3 pauahi 2:11 5:20 6:5 170:6,12 paul 11:19 pause 98:11 103:6 pay 2:9 5:18 23:18 24:7 27:3 27:15 31:9 36:9</p>	<p>48:1 49:9,10 52:25 53:10,12,18 53:19 56:16 63:10 78:19 100:5,8 102:1 113:2 133:4 166:2 178:24 179:5 payable 31:5 40:15 43:12,22,24 44:1,5,7,10 47:25 48:2,7,9 50:8 52:1 53:15,23 55:16 56:3,22 57:5,8,11 57:20 67:6,11,12 68:22 83:22 84:10 179:19 payables 40:24 87:3 payer 40:11 paying 24:20 93:17 112:23 170:17 193:18 payment 2:7 5:16 6:15 7:9,11 24:8 31:14 33:3 40:16 41:12,15,16,21 42:1,2,10,12,20 48:18,20 51:8,24 51:25 52:2,4,8,9 52:17 68:4,7 76:1 76:3 77:23 78:7 80:20,22 81:2,18 82:17,24 87:3 114:4 148:17,18 149:4 170:7 174:20,25 175:9 175:12 178:1,6 179:16 180:23 payments 23:15 41:19,21 48:19 49:2 76:2 87:5 148:21 184:3</p>
<p>p</p>			
<p>p 6:10 8:1,1 12:1 p.c. 9:16 10:8 pace 172:16 page 74:18,25 93:21 175:7 pages 180:20 paid 24:4,13 26:6 26:6,23 27:12,25 49:3 50:3 63:21 63:24 77:21 83:22 85:4 89:8,15 90:2 92:14 101:16 120:21 124:5,8,11 130:6 132:25 133:3,5 141:21 144:14 148:1,3,12 148:13 149:6 161:11 179:24</p>			

[payout - posit]

Page 35

payout 91:3	permitting 168:3	pizza 119:21	26:14 33:13 36:11
pending 76:14	person 15:20	158:1	37:4,15,16 38:1,9
111:14 112:13	personal 14:3	place 18:7 35:11	38:12,13 45:22
115:2 191:2	personally 160:21	60:5 83:10 100:11	46:11 47:6 53:7
people 15:3 93:19	perspective 60:1,2	121:8,23 136:13	55:7 59:20 62:21
114:21 125:20	141:6 173:22	156:8 157:8	68:10,11,17 69:20
153:4 157:25	183:10	182:14 189:3	71:17 72:24 73:8
percent 105:7	pertaining 82:4	191:23 192:2	79:13 82:1,11
113:10 121:21	83:21	plain 74:4 83:25	94:1,11,15 98:18
142:15,16,17,17	pertains 162:21	176:18 177:24	99:25 100:25
142:25 143:4,10	peshko 8:10	plainly 30:9 58:24	101:7,23 106:3
144:16,20,21,24	186:23 188:18,19	plains 1:14	107:21 116:17,18
144:24 145:18	189:8,15,21,24	plan 13:8,10,12	117:4 118:3,9,11
150:8 160:14,21	190:3,20 193:4,14	13:14,18 14:15,18	118:19,23 119:14
168:6 169:1	194:5,11,16,19,23	15:7,10 16:2,2,3,5	119:15 120:6
170:18	195:2,6 197:2,14	16:12,21 17:13,20	121:22 122:17,17
percentage	197:20 198:3	17:23 18:5,14	122:19 127:23
145:14 171:11	199:25 200:2	19:1,10,11,21	134:7,11 139:1,3
perfected 45:20	petition 2:7 5:16	20:16,19 21:8	141:5,24 144:8,12
perfecting 45:13	46:20 88:16	22:6 95:7 98:4	145:25 146:19
perfection 45:23	106:15 175:12,22	101:24 102:5,17	147:17 151:15
perfectly 95:5	176:15,16 177:22	114:5 166:5,6	155:10,19 157:1
107:19	180:17 185:13,17	182:12 191:3,5,15	158:13 161:15
perform 107:2	185:18,19	192:14	165:2 168:5
performance 51:9	petitioning 110:9	plausible 109:25	179:12 183:21
77:22 80:23 82:25	pfeiffer 195:7,11	play 30:19	191:6,6,18 199:8
176:7	195:22	playing 124:20	pointed 46:8
performed 33:6	pfeiffer's 195:9	plaza 8:14 9:4	67:19 68:3
48:24 70:11,23	pgbc 16:5	pleading 139:12	pointing 67:23
76:8	pharmacy 35:3	198:16	points 40:3 45:13
period 6:17 53:11	76:16 77:3	pleadings 105:24	46:2 55:18 59:2
173:14 176:16	phone 191:11	135:21 165:19	65:22 67:18
177:2 180:16,17	193:10,22	please 15:8 25:23	policy 110:17
182:14 191:9	phrase 82:14 83:5	plenty 20:25	176:20 177:7,14
192:13 195:21	83:9,24,24	plus 28:1 72:20	179:10 181:13
196:3,5 197:3,5	pick 56:18	101:8 187:16	192:23 197:18
periods 53:12	picked 172:16	189:11 190:8	portion 63:22
176:17	picks 134:15	pm 200:10	106:12 143:3
permissive 140:25	piece 147:3	pockets 34:5	144:20 175:13
147:10 162:12	152:21 160:23	podium 23:3	177:1
permit 46:17	162:9 169:6	point 13:24 14:21	portray 33:15
permits 167:14	pipeline 108:17	17:18 20:4 21:1,8	posit 99:4
	108:17 110:25	22:21 24:5 25:13	

[position - process]

Page 36

<p>position 18:22 53:21,22,22,23 58:16,17 60:12 101:6,9 122:23 154:20 161:1 175:15 184:25 185:24 posner 178:10,23 180:6 possession 6:7 23:25 45:11 50:18 172:19 possibility 14:5 117:23 possible 21:6 74:11 post 2:7 5:16 13:14,18 18:13 46:14,15,16,16 58:10 61:16,18 66:16 84:7 98:3 175:12 176:16 177:22 180:16 185:13 191:3,16 potential 13:25 57:7 78:4 199:4 poulenc 74:8 power 160:4 practically 34:25 practice 71:3 124:13,22 125:10 130:3 practices 155:11 155:15 166:15 prairieland 153:6 pre 23:21,23 29:12 33:18 37:5 46:20 61:14,18 66:15 88:16 106:15 147:9 175:21 185:17,18 185:19 195:15</p>	<p>precedent 166:8 precedes 70:10 precipitating 91:15 precise 54:18 preclude 188:14 predict 137:11 predictions 137:10 preference 12:12 12:20,22 preferences 20:12 prejudice 169:21 198:17 preliminary 17:1 28:11 premise 32:4 171:13 premised 70:1 premises 171:18 prepaid 38:2,6 77:23,24,25 prepare 188:23 prepared 33:22 39:6 60:19,21 137:23 150:20 186:14 prepetition 175:19 176:16 177:2,21 180:16 188:20 193:1,12 196:19 prerequisites 105:11,12 113:3 presence 129:3 present 10:15 48:9,10 119:2 presented 130:9 130:10 presently 83:22 preserve 16:20 191:8</p>	<p>preserved 147:6 presiding 164:4 pressures 141:13 presume 111:22 presumes 25:25 pretty 20:3 64:4 90:1,7 92:5 131:21 prevail 136:6 165:18 prevent 164:12 prevents 90:22 152:9 previous 93:10 previously 17:3 79:5 82:8,24 price 10:8 26:3,19 63:16 64:13,15,16 65:2,15,19,19 66:1 144:18 pricing 12:15 primary 74:9 principal 81:4 principle 46:8 principles 56:6 111:20 prior 19:3 103:16 124:9 128:12 155:13,15 160:5 168:17 priority 100:3 102:22 185:12 private 108:21 pro 175:12 179:23 180:22 181:6 probably 86:19 100:19 102:3 131:25 134:10 143:14 144:2,5 153:8 159:1 161:14 problem 101:11 102:18 118:22</p>	<p>157:4,16 158:3 176:5 178:11 197:10 problems 118:14 procedural 18:4 186:3,5 procedurally 185:23 procedure 86:1 166:24 181:24 184:25 procedures 7:2 14:1 181:21 182:1 182:4,19 183:8 186:9 proceed 22:23 33:2 95:14 103:22 118:17 129:19 141:8 166:6 168:12 197:25 proceeding 18:3 105:11,13,14,15 108:15 158:22 162:15,25 163:6 163:11 proceedings 162:22 189:1 200:9 201:4 proceeds 23:21,23 24:16 48:19 68:9 68:14,15 70:21 72:9 76:3 78:20 94:15 196:11 process 12:13 13:7,8,9 15:3,10 18:5 20:16,21 22:9 23:18 39:17 64:13 92:16 95:7 97:5 115:22 116:3 116:10 127:15 136:18 167:1 169:12 171:6,8 174:13</p>
--	--	--	--

[processed - quick]

Page 37

<p>processed 33:4 48:22 52:19 61:6 76:6 81:25 82:10</p> <p>processes 41:2</p> <p>processing 29:4 29:23 30:4 31:18 31:25 32:2 42:6 42:18 45:8 73:20 80:8 81:8,11,15</p> <p>processor 33:3,5 48:20,23 49:2,3 51:13 52:18,19,25 53:18 70:14,19 72:3 76:3,6 78:18 81:25 82:7,10 83:12</p> <p>processors 31:4 40:17,25 69:10,13 69:17 71:22 79:9 79:17 81:6,22 82:2 83:2,16 84:18,19</p> <p>produce 130:23</p> <p>produced 24:4 27:13 139:20 151:7 154:18 167:3</p> <p>product 157:13</p> <p>productive 17:16</p> <p>professional 6:17</p> <p>professionals 16:25 18:16 21:5</p> <p>progress 171:25</p> <p>progressive 75:1</p> <p>prohibit 4:2,10 87:19</p> <p>project 161:9,10</p> <p>projected 112:7</p> <p>projection 113:15</p> <p>prompt 85:7</p> <p>promptly 21:6,15 114:6 117:12 166:6 168:12</p>	<p>173:7</p> <p>proof 118:18 121:6 165:23</p> <p>proofs 61:24</p> <p>proper 166:15</p> <p>properly 175:17 178:7 184:21</p> <p>properties 6:10 172:18 180:18,24</p> <p>property 2:3,17 3:4,11,19 4:15,20 5:2 6:9 25:15,19 28:3 37:8 62:13 73:13 76:24 103:10 107:2,3 108:1,2 120:15 121:10,12,21 132:11 162:6,7 164:9 174:25 176:9,12</p> <p>proposal 101:1</p> <p>propose 190:23</p> <p>proposed 181:23 182:3,25 191:4</p> <p>proposition 31:20 50:15</p> <p>propositions 43:2</p> <p>proration 85:15</p> <p>protect 31:3 60:23 97:4 99:6,7,7 100:1 191:7</p> <p>protecting 100:2</p> <p>protection 44:24 96:19 97:23,24 170:23</p> <p>protocol 13:21 14:7</p> <p>prove 112:2 136:20</p> <p>proven 118:11</p> <p>provide 24:8 33:19,22 34:2 51:19,21 124:18</p>	<p>124:19 131:2 167:23 193:22 194:1 195:25 196:2,5 197:23</p> <p>provided 15:16 27:17 28:25 58:16 123:15 130:11 158:4 182:11 184:20 197:3</p> <p>provides 19:10 64:7 76:12 80:21 162:13</p> <p>providing 20:3 127:6</p> <p>provision 32:19 34:25 35:22 55:8 55:10,23 56:8 57:13 65:9 66:7 75:15 77:11 80:3 83:4 84:4 92:8 122:14,22 126:7 127:2 147:21 148:20 175:25</p> <p>provisional 78:20</p> <p>provisions 31:21 44:13 55:15 75:3 75:16 80:8,14 95:25 114:8 122:4 125:7</p> <p>proxy 38:22</p> <p>public 108:20 198:11</p> <p>published 199:7</p> <p>purchase 2:1,15 3:2,9,18 23:2 26:3 26:15,16,19 27:6 63:16 64:13,15,16 65:2,15,18,19 66:1 73:15,22 74:4</p> <p>purchased 77:2 77:10 195:22</p>	<p>purchasers 49:3</p> <p>purpose 56:7 60:22</p> <p>purposes 73:17 76:10 80:19 163:11</p> <p>pursuant 2:8 5:17 6:16 24:6 59:6 74:5 78:11 79:14 191:3</p> <p>pursue 12:12,18 87:24 107:4,17 132:18 193:12</p> <p>pursuing 191:6</p> <p>put 13:21 23:8 37:21 49:18 54:1 55:6 58:20 73:9 86:13 100:22 124:3 137:9 141:8 150:11,13 153:6 170:22 173:5 190:3</p>
q			
<p>qualifies 165:2</p> <p>quarrels 39:20</p> <p>quarropas 1:13</p> <p>question 49:20 52:4,10 55:1 57:9 69:6 74:7 87:22 107:7 108:23 109:1,1 116:9 117:13 119:11 120:5 122:11 129:2,4 143:6,9 145:1 146:19 165:6 176:11,17</p> <p>question's 91:24</p> <p>questions 39:7,8 50:1 105:1 110:12 131:25 144:3</p> <p>quick 12:7 14:15 95:13 137:15</p>			

quicker 115:5	read 49:1 55:23	198:11 199:6	53:24 55:25 57:10
quickly 67:17	66:7 80:7 82:8	200:7	64:11,25 67:6
87:7 115:13	90:16 105:24	realtek 180:18	68:8 69:2,22
139:14 159:3	143:7 148:1	reason 33:18	73:21,23 74:1
quite 15:24 19:25	155:20 176:17,21	34:13 38:4,25	76:15 77:3,7,13
40:4 45:4,19	177:8	47:22 60:25 62:5	77:14 78:5,11
56:11 82:22 148:4	reading 148:5	90:1,7 106:16	79:22,23 80:1,6
157:7	ready 34:1 172:6	113:6,21 134:22	80:13,16 83:18,19
quo 191:9	real 6:9 26:13	141:16 178:4	84:3,5
quote 58:14	93:5,23,25 97:11	192:24	receivables 28:11
quoted 79:5 82:24	106:24 107:20	reasonable 22:1	35:3 36:7,17,18
quoting 78:15	108:4 117:13	74:11 75:13	40:11,15 47:10,15
r	151:5 153:23	150:12 191:15	61:3 63:7,8,20,20
r 1:21 8:1 9:14	154:10 172:12	192:12	63:22 66:2,14
10:18 12:1 201:1	176:9 178:11,20	reasonably	68:12 76:1,12,16
raise 13:24 87:1	187:7	163:19	77:3
108:3 131:19	realistic 94:4	reasoning 185:25	receive 28:6 65:1
140:10 142:9	reality 150:21	reasons 47:21,22	125:18 129:7,25
187:24	realized 82:16	130:5	received 182:7
raised 83:13	114:3 121:7	recall 105:23	185:13,16
85:15 86:2,11	124:21	108:18 155:12	recipient 143:9
87:22 89:23 94:9	reallocation	170:13	164:22
129:2 142:6,9	100:23 164:18	recapture 122:3	recited 124:11
159:24 172:13	168:16	122:14,22 125:7	reclarify 36:11
186:8 187:21	really 15:2,4 31:6	126:6 144:22	recognize 79:2
raising 140:21	32:21 34:24 53:14	147:21 148:20	87:25 180:24
148:9	61:21 68:10 72:19	161:6	recognized 37:8
range 17:3	86:23 92:17 93:6	recaptured	40:21 179:1
raniero 10:21	104:12 107:11,19	144:20 145:24	recognizes 180:21
rate 180:22	110:4 111:2,3	receipts 46:7	recognizing 79:14
rated 175:12	113:12,20,25	receivable 23:7	recommendation
179:23	114:1,6 115:21	29:7,18,25 30:8	181:10
rating 181:6	118:9 133:5	30:13,18,24 32:7	reconciliation
rationale 24:19,21	138:15 139:1	32:14,18,23,24	15:18 16:23 22:5
ray 12:4 85:13	145:10 147:6,14	33:1,9 35:2,10,12	23:17 24:5,9 26:5
raynor 11:16	147:19,20 150:6	35:16,20 36:1,13	39:17 64:12
rdd 1:3	150:16 151:10,17	36:22 37:3 38:17	reconciliations
reach 17:19	161:8,11 162:4	38:20 40:2,7	25:11,17,24
193:23,23	168:2,11 170:14	41:11,13 43:8	reconciling 26:19
reached 59:21	171:14,24 173:21	44:5,5,10 46:3,22	26:21,22 27:19
142:22 193:20	175:24 176:17	47:2,7,18 48:17	reconsider 167:6
194:11,13,16	177:9,12 178:5	49:12,14,15 50:1	record 23:9 27:9
198:3	180:6 188:7	50:4,25 53:5,11	54:21 97:17 99:19

[record - request]

Page 39

119:15 140:15 147:1 148:14 150:19 159:24 164:17 166:22 167:9 173:5 188:18 201:4 recorded 60:2 records 61:5,22 149:1 151:1 154:3 195:24 recoup 132:24 recoupment 39:18 79:4 81:15 recover 65:14,14 122:16,23 recoverable 13:5 recoveries 12:13 12:18 13:8 16:14 recovery 12:15 189:12 red 80:10 redacted 2:17 3:5 redman 131:6 reduce 35:7 76:19 reduced 113:22 refer 44:22,24 45:1 158:5 reference 163:2 referenced 44:16 referred 18:14 19:24 44:5 referring 19:17 40:12 43:19 72:6 138:8 149:25 162:20 refers 35:12,19 40:14 43:14,20 51:22 54:19 57:6 83:9 108:10 119:11 refile 192:11,15 reflect 154:18 166:10	reflected 127:12 127:13 182:3 reflects 140:15 reforming 181:5 refuse 34:7 refused 24:15 33:19 refute 29:17 regard 21:16 123:9 186:8 regarding 23:10 24:5,13 138:4 148:22 163:16 199:5 regards 195:15,17 195:20,24 registered 154:9 regular 57:8 100:6 regulatory 15:23 reimbursed 153:7 reimbursement 17:7 149:6 161:12 reinert 11:17 reiterated 27:2 reject 6:8 171:4,9 172:19 rejected 176:10 181:13 related 2:5,8,18 2:23 3:5,12,21 4:12,22,23 5:2,17 15:17 19:24 22:9 31:16,19 43:3,5 44:13 78:2,3 82:21 86:3 87:11 103:13 104:13,18 105:14 116:19,20 162:16 164:6 171:17 189:4 relates 62:19 164:1	relating 190:21 relationship 49:16 83:2,11 relative 139:8 relatively 87:7 192:13 release 33:12,18 33:23 36:17,21 39:1 60:7,21 62:24 released 19:12 34:1,2 58:11,20 64:22 71:14 132:16 releases 19:9,12 19:17,20,21 relevant 76:10 80:8 87:4 89:21 89:22 109:2 123:6 123:6 147:23,24 148:20 155:14 167:13 185:14 reliant 120:14 relief 4:21 5:7,12 60:16,17 68:24 85:1 103:14 112:14,18 115:8 162:1 176:8 186:24 188:14 191:13 193:6 196:10 relies 79:3 164:21 relying 89:25 128:10 131:7,10 151:25 165:10 remain 86:7 157:8 remainder 23:18 remaining 27:6 83:13 90:19 147:7 187:6 remains 16:6 156:1	remanded 122:10 187:11 189:1 remember 43:17 49:22 remind 17:9 reminded 24:25 143:23 remotely 94:19 removed 131:9 render 75:16 159:6 rent 2:7 5:16 25:14,20 27:10,10 27:16,18 28:1 77:23 85:15 170:16,16,23 171:18 repeat 29:20 58:5 repeatedly 123:5 repeating 140:18 replace 93:13 replacement 182:23 reply 3:1,11 4:20 6:23 29:20 31:15 31:24 33:17 98:19 127:17 report 12:10 21:4 represent 68:6 136:17 187:4 representation 174:11 197:18 representations 39:21 167:4 174:17 representative 129:13 represented 166:19,25 request 38:1 103:19 104:15 105:22 159:8,13 170:20 188:4
---	--	--	---

[requested - right]

Page 40

requested 33:20 103:17 124:20	71:13 78:23 79:3 79:10 81:19 82:3	105:1 111:7,20 116:18 117:8	restructuring 19:14 20:23
requesting 34:3 87:5 134:8	84:17 97:25 98:2 98:3 102:1 167:5	118:5,7 162:18 168:6 173:14	result 41:17 42:21 43:25 48:14 52:7
requests 171:1	171:14 193:15	175:12 182:9	61:16 75:15,15
require 35:23 49:9,10 164:19 192:10	reserved 20:11 62:1 83:15,15 96:21	189:15 191:22 193:12	82:9 111:14 160:12 163:10 192:20
required 53:20 141:7 152:22 153:2 161:7 167:18 179:24 197:21,22	reserves 34:21 39:2 58:11,12 59:13,13,15 60:5 60:5,7,15 62:11 62:24,25 69:9 71:8,8 73:10,19 81:16	respectfully 27:10 44:9	resulting 33:3 48:21 52:18 68:9 70:21 76:5 81:24 82:14,22
requirement 101:15 122:12 123:14 124:6 127:17 153:4,13 163:17 164:15,23	reserving 145:6 146:25 147:6	respond 41:19 67:18 72:23 144:6 198:15	retail 46:24
requirements 132:7	resident 121:13	responded 91:20 139:20 182:2	retain 62:9 63:9 66:2,21,21 125:25 126:5
requires 30:25 84:4,9 124:9 157:18 163:4,4 166:7 176:7 180:15	residual 165:4	responding 144:2	retained 13:17 169:15
requiring 60:15	resist 78:15	response 2:4,14 3:2,8,20 6:1,4 69:4 70:4 113:9 123:18 136:23 149:17 172:12 198:15	retaining 35:9 64:10 65:24,24 66:11 77:1
reservation 6:1	resisting 58:21	responsibility 159:25	return 31:11 57:23
reserve 18:5 29:6 29:17,21,23 30:3 30:8 31:2,5,10,12 32:5,10,15,23 33:9,13,13,18 34:15 36:6,21,25 38:16,21 40:11,16 40:24 41:19,20 44:2,14,17,18 46:6 50:7 51:5,5 53:1,20 54:7,11 54:24 55:2,7 57:15,18 58:18,21 60:23 62:16,17 63:7 64:3 65:10 68:1,6,12 69:2,24	resolution 85:7,23 148:17 196:13,17	responsible 150:24	returns 34:19 60:23,24
	resolve 19:7 100:20 102:4 110:22 171:24 172:11 173:5	responsive 139:12 140:22	revenues 46:24 161:21
	resolved 64:19 106:18 112:12 113:11 135:20 137:13 158:14 182:12 190:23 191:3	rest 26:5 52:10 73:18 131:22 133:24 142:6,11 143:12 144:9,11	review 16:25 17:2 75:20 78:9,16 81:11 166:13 182:25 184:19
	resolving 16:6 21:14 114:6	restatement 43:3 67:4	reviewed 80:14
	respect 23:9,20 25:13 35:2 39:7 40:1,22,25 46:2,9 50:14 53:8,23 55:10,21 58:23 59:18,21 64:19 66:7,9 72:25 73:4 76:15 90:17 99:14	restraining 115:10	revise 185:3
		restricted 32:8,16 77:18	revisit 141:14
		restrictions 154:23	revolve 104:13
		restricts 83:18 154:21	revolving 54:20 55:11 70:2 82:5
			rh 177:3
			rhone 74:8
			ridiculous 38:12 125:21
			right 14:11,14 17:2 18:3,17

[right - schein]

Page 41

19:16 20:21 22:6 27:5 28:21,23 29:8 30:16 31:1 31:14 34:5,8,16 35:12 37:12 39:15 42:14 45:16,17,18 45:24,25 47:9 48:4,20 49:5 50:22,22 51:8,14 51:20,24,25 52:2 52:16 53:1,13 57:21,23 58:18 59:8,20,25 60:3 60:12 61:17 63:9 63:20,23 65:8,14 65:24 66:12,18 68:4,6,24 69:16 69:19 71:4,4,4,6 71:25 72:1,4,10 73:11,11 78:23 79:4,5,10,14 80:22 81:12 82:2 82:19,24 85:17 87:8 90:3,6,11 91:24 93:18 94:25 96:22 97:1,21 100:1 105:8 106:6 106:22,22 107:13 109:1,6 110:2 111:9 112:9 113:2 115:12,21 116:6 116:19 119:9,23 120:7,20,21 121:2 121:4,22 122:5,13 123:4 130:16 132:4 133:3,18,19 133:21,22,24,25 135:3,24 140:14 140:19 141:19 142:19 143:4,13 143:14 144:7 146:4,7 147:5,14 149:20 150:3	152:15 155:18 158:24 159:22 160:23 161:24 165:12,23 167:5 168:21 169:2,23 171:15 173:10 174:22 175:23 178:21 179:1 180:2 181:14 183:15,22 184:8 184:15 188:23 189:8,19 190:22 192:4 194:16,18 194:19,20,25 195:12 198:13,20 199:14,17,20 rights 6:1 40:24 59:10 61:25 66:5 74:23 77:18 78:6 79:6 88:4 92:13 94:13,22 101:25 107:4 108:21,21 140:22 145:6 147:5,6 160:3 173:14 193:15 ripe 133:8 rise 53:25 82:19 82:25 85:10 165:19,20 risk 44:24 99:6 101:24 102:23 road 10:3 201:21 robbins 10:1 robert 1:22 2:10 5:19 10:23 170:10 robes 160:19 robin 115:1 rolacheck 55:1 roll 88:13 room 1:13 rothman 181:3 rough 129:4	roughly 13:1,3 15:6 121:14 144:16 175:10,17 roundup 195:18 195:23 198:10,20 199:6,10 rubina 57:1 rule 70:16 83:8 126:11 186:14 rules 161:17 177:12 ruling 73:17 84:25 85:24 115:2 115:13,15 166:20 166:23 167:25 177:6 186:11 191:25 rulings 115:6 run 84:23 182:1 running 64:20 121:16 123:1 ryan 11:17	saying 35:24 36:10 50:6,10,13 50:16,17 58:7 62:15 71:3 89:24 91:2 94:14 109:3 113:21 120:25 126:20 127:17 146:18 149:18 155:14 156:11 157:2,5,23 160:23 184:15 190:1,15 196:15,23,24 says 34:8 35:3,5 38:23 42:2 43:3 45:11 47:13,19 48:2,3 51:21 58:14 63:4 65:24 66:8,20 67:10 68:19,22 92:8 101:12,25 102:17 109:2 111:18 112:1 141:12 146:20 147:22 151:10 153:1 156:14,21,23 157:17 158:6,9 177:23,25 183:9 183:22,24 sbarro 130:14 sbarro's 158:1 scenario 22:19 97:22 schael 11:18 schedule 57:8 59:12,12 115:5,14 159:4,5 scheduled 7:14 scheduling 172:1 schein 10:13 144:17,17 145:5,8 145:11,15,17,22 146:5,9,13,18,23 146:25 147:3,8
		s	
		s 2:5,18,23 3:5,12 3:21,22 4:12,24 5:2 8:1 11:4 12:1 s.d.n.y. 163:15 s8729-73 6:9 sale 22:8,17 33:5 34:13 48:24 60:9 62:5 70:10,23 76:7 81:23 88:25 100:13 sales 22:9 43:14 57:9 satisfied 52:12 58:1,2 105:12 satisfy 33:10 46:6 50:9 61:13 124:6 saved 34:17 saw 134:10 149:13	

[schein - sense]

Page 42

149:8 157:10 school 4:18,21,25 5:4,6,11,14 9:17 10:2 103:14,15 104:5 105:3,5 106:6 112:19 115:1,25 117:10 118:7 120:13,14 121:11,25 122:17 122:24 139:10 140:18 142:2,18 143:1,11,18,19 144:13 145:16 146:12 150:7 153:25 154:14 161:25 164:11 165:4,7 168:22 170:14 schools 116:8 120:25 170:13 schrock 12:4,5,10 12:22,25 13:13,16 14:6,13,15 19:19 19:23 21:22,25 22:14,22,25 85:13 85:13,20,22,25 86:17,21,25 87:9 87:23 88:3,6 91:21 93:1 94:5 94:18,21,23,25 95:9,13,16 101:12 101:24 102:17 103:1,3 schwartz 10:1 115:1 schwartzberg 11:19 scott 11:12 scrub 154:25 155:2 scrubbed 131:8,8 seal 78:14	sean 9:7 95:21 sears 1:7 3:23 4:15 6:9 12:2 16:7 20:9 31:5,10,13 33:19 34:14 41:23 43:25 45:24 46:12 46:20 47:25,25 50:2,5,6,13,16,18 51:25 68:16 79:15 83:12 84:19 106:6 106:10 107:8 108:23 109:2,5 110:21 114:21,21 118:11,21 119:8 121:7,18 122:11 123:8,11,14,18 124:9,19,20 125:4 125:5,14,15,24 126:7,10,13,17,19 126:20,24 127:16 127:20 128:4,5,15 128:19 129:2,4,13 129:15,18,23 130:2,4 134:11 138:8,9,9,16,19 142:16,17 143:5,7 143:8,12 144:14 145:23,24 147:7 147:13 148:9 149:3,11 150:23 151:4,22 152:1,6 152:12,13,22 153:1,4,5,8,10,12 153:15,15,18 154:3,4,7,8,11,13 154:21 156:17,19 156:20 157:5 158:5 160:6,6,8 161:10,12 165:5 165:11 166:1 167:16 169:8,14 170:3 187:8,13,14 188:20 192:5	194:8 197:21 sears's 46:23 second 28:12 35:8 40:7 41:11,16,25 51:7 55:25 64:10 68:11 77:1 88:16 90:18 94:12 95:23 96:18 98:21 120:17 131:6 134:23 135:24 179:21 182:22 184:11,22,25 secondly 22:4 165:9 section 31:8 32:7 55:9 64:6 73:13 73:24 74:5 75:25 76:11 77:5,16,17 79:11 80:17,21 81:2,2 82:3,13 83:18 84:13,15 161:5 162:13,20 162:20,21 163:4 164:10,13,15,18 165:22 167:9 176:1,18 sections 45:10 secure 116:7 secured 50:21 secures 88:17 securing 47:24 securities 163:14 security 29:22,24 30:4,5 31:3 32:8 32:16 35:13,17,18 35:23 36:2 37:2 40:2 41:24 42:11 44:16 45:1,4,8,12 46:14 47:7,10 50:19 64:14,20,21 77:15,17,19,25,25 79:1,6,11,20,23 79:25 80:6,10	83:15,16 116:7 142:23 183:16 see 27:3 38:22 41:7 54:19 68:10 75:18 92:11 93:24 94:1 98:10 102:13 108:9 109:22 143:16 144:8 145:10 151:4 163:13,21 177:9 181:8 199:22 seeing 93:12 140:21 seek 133:7 171:16 173:2 184:2 seeking 60:17 68:24 132:8 167:3 182:4 seeks 84:15 132:24 133:7 162:12 196:7 seemingly 90:22 seen 29:16 59:17 149:1 selected 12:11,17 sell 47:19 seller 33:3,4,6,6 35:2 48:21,22,24 48:25 52:18 56:3 70:11,11,24 74:2 76:4,4,6,8,8,15 81:24 83:20,22,24 84:11 seller's 70:24 sellers 35:7 55:25 76:19,21,24 77:18 seller's 33:7 selling 66:1 semiconductor 74:24 sends 156:20 sense 21:9 77:6 82:17 92:7 104:20
--	---	--	--

134:16 144:5 158:19,25 178:11 sent 116:23 119:7 119:8 155:12 sentence 76:18 196:14 separate 26:2 49:17,22,24 55:14 57:6,13 65:17 83:11 85:1,11 168:8,10,11 separately 40:14 september 191:17 191:19 series 25:10 26:8 serious 39:12,20 serve 31:3 164:14 service 48:24 servicer 78:18 servicers 78:13 services 10:9 15:15,17,25 20:4 33:6 70:11,23 76:8 173:7 servicing 78:10 serving 15:6 set 14:25 24:24 25:1 26:5,9 42:14 42:16 112:20 166:22 188:1,3 setoff 39:15 45:16 45:17,19,24 48:3 48:5 49:5 50:22 50:23 51:1,14 53:1 79:4,5,14 81:14 82:19,21 setoffs 25:11 77:24 sets 34:25 setting 39:13 settle 84:22 167:22 182:4	settled 56:25 126:19 183:22 settlement 16:4 17:14 97:3 127:22 127:24 128:11,12 182:5 183:4,23,24 183:25 settlements 181:25 183:1,1,5 183:6,10 settling 7:2 181:21 setup 78:23 seven 174:20 seventh 180:7 seyfarth 8:19 87:17 share 144:22 145:6 171:12 shared 74:11 173:17 shares 145:25 sharon 187:2 shaw 8:19 87:17 shiftan 43:10 shipped 72:15 185:17,18 short 14:10 171:7 179:20 shortfall 170:16 170:19,23 shot 150:14 165:16 shouldn't 44:18 show 61:5 98:19 160:25 165:15,17 showing 148:15 shown 196:24 shows 37:25 shrinking 158:12 shriro 11:20 shut 98:1,22	sided 112:11 181:6 significant 14:23 15:13,15 17:12 170:16 171:25 192:24 significantly 152:2 silence 155:19,23 161:2 169:8 silent 156:12 similar 46:17 117:18 123:16 126:12,12,22 similarly 31:24 122:20 simple 98:16 99:4 102:17 130:14 simply 44:17 84:11 112:4 147:22 155:8 159:7 163:23 196:7 singh 4:15 single 31:22 121:16 149:1 sir 51:7 106:2 112:24 sit 16:24 17:18,21 17:23 94:5,11 95:10 103:1 site 114:18,18 sites 31:19 sits 141:16 sitting 133:3 134:7 141:20 situation 90:25 179:17,18 six 47:20 105:11 121:15 135:8 172:20 sixth 130:20	sixty 142:15 176:2 size 101:5 182:13 skeletal 129:7 sleep 124:3 slot 191:12 smaller 69:13 smith 185:9,10,10 185:24 186:5,17 186:20 snapshot 84:6 100:11,12 sold 47:18 185:12 solely 152:1 197:11 solutions 201:20 solved 29:12 somebody 174:4 somewhat 17:16 sonya 7:25 201:3 201:8 soon 13:6 sooner 172:10 sophisticated 74:21 sorry 39:2 48:16 52:1 55:4 62:23 72:5 81:23 91:2 106:2 109:11 112:16,22 113:24 116:2 119:13,18 128:10 144:13 145:25 150:4 172:9 175:4 176:3 180:21 183:3 186:18 187:19 196:14 sort 14:1,2 64:14 104:6 107:13 109:22 145:14 155:8 sorts 114:2 sotomayor 177:4 178:23
--	---	--	---

[sought - street]

Page 44

sought 85:1 128:5 172:23	standard 24:19,21 114:20 141:11 163:18	states 1:1,12 105:10 162:19	162:1 164:13 168:1 186:22,25 187:5 188:15 189:2 190:24 191:8,13 192:3 193:1,6,11 195:7 195:15 196:22 197:11 199:16
sounds 53:4 117:8	standing 87:23 88:1,9	statistics 113:9	stayed 112:13 133:25 160:13 191:25 200:8
sources 166:7	stands 101:24 102:17	status 95:13 172:2 191:9	stays 62:18 197:16
south 176:13,14	start 14:24 20:8 92:23 94:15	statute 118:5 121:23 122:3,15 122:16,20,21 123:4 124:2,5,23 125:6,10,13,22,23 126:2,4,4,8,13,22 127:13,16,18 128:10 129:1,10 135:2,4 138:17 143:8 144:19,25 145:12 146:20 147:13,21 153:24 155:8 157:14 160:1,2,8 161:5 161:13 162:24 165:9,11 167:14 173:25 177:9,15 179:3,15 181:12 198:8 199:1,12	stem 8:12 9:2 stems 53:14 step 118:3 195:4 stepping 98:21,22 steps 21:7 107:6 steven 11:8 193:5 193:11 stip 197:16 stipulated 142:24 stipulation 142:22 193:23 194:17 197:25 199:23 stop 33:24 39:19 141:24 151:19 stopped 112:21 153:19 store 64:8 76:23 76:23 170:9 171:5 171:8 172:10 stores 44:1 72:15 72:18 78:21 story 64:9 68:21 straight 16:3 17:13 34:4 straightforward 112:10 113:4 strain 54:6 street 1:13 9:11 9:18
southern 1:2	started 12:6 13:6 124:20 136:2 152:7,8 198:11 199:6	statute's 118:9 145:9,23	
sovereign 111:20	starting 13:7 15:1 137:15	statutes 122:15 126:11,12 128:3 145:9	
space 129:17	starts 129:17 176:19	statutory 126:10 126:11 128:8,21 175:25 177:13 187:16 189:12 190:9,18	
spans 195:23	state 74:6 105:13 105:13 106:4,7,7 106:18,20,24 107:12,19 111:22 112:2 114:11 115:2,9 121:8,9 121:21 122:15,20 126:2,4,8,13,20 126:21 127:15,18 128:15,22 138:4,5 138:11 160:16 162:15,15 163:1,6 163:9 165:25 167:18 168:4,15 168:18,20 175:16 195:14 198:16		
speak 54:14	stated 109:25 111:18 113:3	stay 2:2,16,23 3:3 3:10,18 4:22 5:7 5:12 23:2,12 25:2 39:1,12,15,18,25 40:13 85:3,7,10 103:14,18 104:14 105:22 107:18 115:3 132:19	
specific 32:18 70:3 82:3 95:25 113:13 125:24 138:5,6,17 139:2 147:13 150:5 186:10,10	statement 14:19 14:25 18:8 197:24		
specifically 73:17 81:21 122:15 125:24	statements 159:24 160:6		
specified 82:5 165:9			
specifies 100:20			
spend 22:10 91:20 93:15			
spending 89:17			
spent 63:3 93:12			
split 104:6			
spoke 91:21 103:15			
sponsor 128:25 129:9,12			
spots 196:1			
spreadsheet 130:13			
spurned 153:11			
stack 88:8			
stage 131:24			
stake 166:11			
stakeholders 15:2 17:24 18:21 19:6			
stand 72:5 95:22 100:8			

[stretch - tax]

Page 45

stretch 92:15 125:5 158:15 strike 104:18 109:17 118:15,23 137:21 169:19 strong 15:9 struck 179:9 structure 13:15 16:8,11 18:7,17 185:1 191:4 students 120:13 121:20 stuff 73:10 139:24 155:16 183:14 subcommittee 19:14 20:23 subject 17:9 18:20 18:23 19:2 28:22 39:18 47:12 88:19 110:10 126:23 163:16 183:7 186:7 195:4 submit 29:3 30:2 32:25 44:9 167:21 169:13 185:4 193:2 195:1 submitted 33:16 57:9 123:16 submitting 172:1 subsequent 2:10 5:19 29:20 179:9 subsequently 171:3 175:8 subsidies 125:18 128:16 subsidy 120:19,22 121:8,9,10 124:6 125:21 126:8 129:8,11,20,25 161:11 substance 177:6 substantial 108:11	substantially 89:1 substantive 21:20 172:12 succeed 188:25 successful 14:2 103:21 133:6 successor 182:8 suffer 198:17 sufficient 16:14 sufficiently 137:22 181:12 suggest 45:7 54:22 102:7 118:17 119:24 150:19 169:15 suggesting 36:25 90:4 93:25 110:22 151:15 suggestion 36:24 95:10 142:21 191:22 suggests 112:11 suit 195:15 suite 9:18 10:3 201:22 sum 62:6 177:5 summarized 166:21 summary 115:11 117:7 136:3 137:4 sums 57:7,7,15 sunny 4:15 super 100:3 102:22 supplement 19:11 supplemental 2:14,21 3:1 5:1 28:13 29:3 support 2:22 3:11 20:19 28:13 167:17 supported 147:20	supporting 155:24 160:25 supportive 12:19 supposed 24:7 25:15 27:15 72:14 73:2,3 103:9 supreme 108:16 114:8 sure 14:21 20:25 29:8,14 34:23 36:10 37:13 39:10 39:12 53:6 61:5 84:24 86:1,7 95:17 102:15 105:24 111:13 120:18 132:5 136:3 141:4 150:9 155:2,20 157:22 167:24 171:2 173:24 174:9 175:5 186:25 195:8 196:16,21 198:10 surety 77:23 surplusage 56:5 surprise 44:18 surveyed 17:12 susceptible 75:4 svtc 74:25 swap 38:4 sweet 179:13,15 180:21 swipes 158:6,8 synonym 48:7 synonyms 68:20 system 23:22 24:11 170:14 t t 9:21 201:1,1 take 13:2 15:11 38:1 47:12,17,18 51:4 72:13 84:10 87:13 89:6 96:14	99:5 105:21 114:9 114:10,18 119:5 128:2 136:1,17 137:1,10 141:12 145:5 156:7 158:21 159:5 160:20 184:23 189:17 taken 21:7 58:17 60:11 62:9 136:4 182:14 takes 84:6 92:21 154:19 talk 125:16 126:2 talked 20:17 108:16 123:5 158:17 talking 92:18 95:6 96:9 107:24 122:25 123:5 128:3 132:11,21 143:3 145:21 157:10 178:21 183:1 194:8 talks 56:15 124:2 124:6 125:13,23 125:24 130:2 179:14,15 tango 92:21 tangoing 92:23 target 126:22 targeted 166:8 targets 21:13 93:18 task 21:5 tasks 104:7 tautology 122:1 tax 18:15 104:10 104:11 125:18 161:21 171:18 176:16 179:23 180:1,15
--	---	--	--

taxation 124:3	tension 18:8	that's 13:23 14:24	58:20,21 60:17,19
taxes 120:15	tentatively 20:17	15:5,24 16:5,10	60:21 61:21,23
121:9,10,12 124:5	teresa 11:10	16:18 18:10,14,16	63:20 64:1 66:1
124:5,7,8 130:6	term 30:24 43:4	18:20 19:15,16,25	67:5
147:25 148:1,3,10	47:1,2,3 63:15	21:20 22:14 26:20	they've 27:14
148:12 149:6,6,21	68:18 70:7 76:10	26:22 27:1 30:10	29:12 45:18 50:10
174:25 175:9,21	79:11,24 80:1	30:18,20 35:11,14	50:18 59:19 60:15
175:23 176:12	81:19 82:13 83:16	35:21 37:12,18	62:1
177:1,21,23 178:6	83:17,25 84:1	38:11 39:22 40:15	thin 166:2
179:18 180:9,22	88:21 124:10	40:17 41:24 42:4	thing 56:6 62:19
taxing 105:6	126:8 130:13	43:2 44:7 45:22	68:23 104:13,14
156:6 157:12	131:5 154:25	45:23 46:1,23	133:21 150:18
168:25	171:7 177:20	47:3,3 48:3,4,4	168:20 177:10
taxy 161:21	179:8	49:9,16 50:16	178:25 179:10
tbd 18:20	terminology	51:25 52:9 53:21	187:18 200:8
team 147:19	131:11	53:21 54:5,12,12	things 16:1 51:10
technically	terms 31:16 38:19	55:25 56:6 57:17	56:9,12,18 80:24
169:11	56:10 57:20 68:23	58:14,22 59:15	82:25 99:5 139:14
technologies	69:14 71:17 88:18	60:9 61:10 63:2,3	141:15 144:1
74:25	88:20 91:6 100:20	63:18,25 65:3,4	155:1,10 156:3
tee 22:12	107:8 108:23,24	65:16,16	180:1,13
teed 18:1 137:16	124:4 126:12	theirs 90:6	think 12:14 13:5
telephonically	134:12 137:10	theory 75:11	15:1,7 16:19 17:1
10:15 187:2	139:8,13 140:13	125:3 198:14	17:2 21:12,14,25
tell 15:19 61:17	144:1 149:23	thereof 48:20 68:9	22:10,12,20 27:1
61:18 109:19	154:1 173:18	there'll 20:25	30:12 35:15 36:5
112:7 113:15	testified 131:7	there's 12:25	39:24 40:20 41:4
120:5 147:12	testify 151:8	14:23 15:13,15,24	41:8 42:7 45:9,9
148:19 157:24	testimony 28:17	18:13 19:9,24,25	45:23 46:19 48:6
160:17	thank 19:19 39:3	22:11 28:21 34:20	49:10 50:4 52:15
telling 136:23	67:16 71:1 95:19	36:24 40:23 42:15	52:16 53:9,13,16
tells 43:12,22,23	97:12 102:25	44:18 48:6 49:16	55:18,18,19 57:3
55:2	103:4 155:5	50:14,20 51:18	57:14 58:23 59:1
temporary 115:10	159:21 169:17,23	53:1,11 54:5,8,19	59:19 60:2,7,9,13
176:6	172:13 174:2,17	55:19 57:9 59:2	60:20 61:7 62:5
tenant 130:10	184:17 186:17,20	60:18,20,25 63:16	62:11,14 63:3
tenants 109:4,8,8	192:18 193:4	65:12	65:11,12,15,20,21
109:12 118:8,12	195:6 199:25	they'd 30:5	66:24 67:3,5,8,9
118:13 119:16	200:1,5	they're 14:22 22:6	67:13 70:7 71:16
125:2 130:12,14	thanks 22:22	25:20 26:12,17	73:5,8 91:14 92:2
131:3	67:15 87:9 131:23	32:12 33:14 36:22	92:5,16 93:4,18
tennessee 67:24	172:15	42:14,16 49:22	93:23 94:6,9,12
		52:8,8,10 57:17	95:2 97:10 98:14

[think - transform]

Page 47

98:20 99:3,13,17 101:11 102:2 104:19 106:5,19 106:22 107:5 108:14 109:2 110:24,24 112:12 114:7 116:19 117:7,25 119:12 120:4,21 121:24 122:1 131:24 134:1 136:17,23 139:4 141:6,11 142:8 143:6,14 144:16 146:7 147:16,17,18 150:6 155:7,17 156:11 157:3,7 162:4 168:10,12 172:13 175:24 177:5,19,24 179:2 179:6,12,13,13,24 180:1,5,8,9,14,14 180:18 181:2,11 182:17,17,21 183:8,11,15 184:20 188:6 190:3 192:19 thinking 22:14 166:10 third 19:21 20:18 41:12 68:17 85:5 107:1 109:6 114:17 118:19 125:17 151:23 156:4 178:17 180:25 185:25 193:17 194:8,15 195:5 thomas 9:14 97:15 thought 59:22 104:20 172:10 187:20 190:1,16	194:7,8 199:13 thousand 47:16 121:15 thousands 129:17 thread 78:18 threat 38:11 threatened 59:18 three 35:6 41:9 47:14 57:8 65:22 92:23 113:21 176:2 177:3 187:12 threshold 36:7 37:18,24 38:15,15 71:10 77:5 153:22 thrilled 157:8 throw 92:15 thursday 25:5 28:5,7 173:13 tie 68:21 tied 125:14 time 13:10 16:4 17:15 18:23 20:13 20:20,25 22:11 27:2,13 33:25 45:3 57:23 59:11 60:8,13 61:4,9 66:4,8 72:6 74:12 88:9 89:18 101:24 108:17 113:25 114:3 116:13 117:9 118:12,14 120:1,1 131:9,16 131:16 137:17 151:5 152:6,6,10 152:23,24,25 153:6 154:15,16 154:18,20,24 155:3 158:1,13,21 163:21,25,25 171:1,12,17 174:2 178:3 179:18 180:2 183:11	186:8 191:16 192:6 193:18 195:22 196:5 198:6 timeline 93:24 112:8 113:15 167:7 timeliness 106:1 165:25 timely 2:10 5:19 105:12,21 111:14 112:3 114:9 136:14,20 139:16 141:12 162:14,25 163:5,10,16,17,19 165:24 166:13 167:5 176:7 times 31:12 68:16 124:11 129:4 timing 135:25 139:8 151:24 179:4,4 title 44:3,4 105:15 105:16 162:16,17 162:17 163:12,13 today 20:2 28:20 32:17 39:9,23 58:15 66:15 103:16 104:24 137:13,17,19 139:18 143:25 160:15 168:1 172:7 173:5 182:17 186:6 200:3,6 today's 102:6 162:5 174:17 told 42:24 44:14 66:15 67:21 89:14 146:16 166:14 194:18 tomorrow 115:19 116:4	top 109:5 145:19 total 24:10 27:25 28:2 71:10 170:18 totality 177:15 totally 67:25 91:15 touch 103:5 193:24 town 112:23 134:8 144:14 tracing 61:13 track 150:24 151:13 154:7,11 tracks 43:14 78:7 traffic 72:17 tranches 96:11 trans 26:1 27:5,5 transaction 31:23 59:7,11 61:12 68:14 81:17 185:15,19,19 transactions 31:21 37:6,11 43:13,15,23,25 44:11 46:23 48:13 48:15 51:22 54:2 54:4 61:9,16 62:4 78:21 transcribed 7:25 transcript 201:4 transfer 37:9 transferred 23:22 37:1,2 38:14 transferring 35:8 64:7 65:23 76:20 transfers 13:1 transform 2:2,4 2:16,19 3:1,3,6,8 3:10,13,18,20 5:23 8:13 17:6 20:1,6,8 23:2,17 23:21,23 24:1,6 24:10,14,25 25:4
---	---	---	---

[transform - understand]

Page 48

25:8 26:10 27:12 27:17 33:21 36:21 37:3,17 39:12 59:4,6 64:14 73:16 77:10,11 80:9 81:20 82:6 83:14 84:23 85:2 85:11 86:3,12 161:18 170:20 171:3,6,14,17 172:24 173:2,4,15 173:17 174:4 transform's 173:19 transforms 56:16 64:2 transform's 58:9 58:10 transit 23:20 24:11,16,22 25:13 26:13 28:1 38:4,5 39:7 72:13 85:16 transition 15:16 15:25 20:4 transparent 174:16 transposed 176:4 trauma 13:21 treasurer 161:21 treat 166:17 treated 17:13 29:22 30:4 38:16 77:9 148:8 181:7 treating 28:16 109:24 148:8 treatment 167:3 171:2 trial 114:16,17 158:18 159:17 166:16 tried 33:15 110:3 194:24	trigger 54:19 55:16 58:1 triggered 53:25 54:2,3 55:3,5 73:24 triggering 55:9 82:3 triggers 53:9 trip 172:7 truck 72:16 true 32:4 54:12,13 61:3 92:22 101:18 113:6 201:4 trust 4:1,5,9 7:6 8:20 13:18 18:13 18:18,19 87:17,19 96:10 182:8 184:7 191:4 trust's 87:10,23 trustee 4:2,9 18:22 87:18 93:16 93:19 94:3 96:6 96:10 99:2 182:9 183:17,19 184:6 184:22 trustees 2:11 5:20 6:4 170:6,11 try 17:19 20:15 95:10 96:12 100:20 106:13 125:5 171:24 194:17 197:23 trying 15:23 22:11 25:25 26:1 26:3 43:4,5 95:7 96:14 98:17,22 103:4 113:20,20 117:18 118:2 180:12 190:6 193:23 197:5 198:4 tuesday 186:13	turn 24:15 25:5 28:10 58:25 60:15 60:19 63:1 65:9 65:11 98:2 104:1 107:1 149:14 turned 25:15 28:3 62:16 88:25 133:21 164:10 turning 25:20 turnover 2:3,17 3:4,10,19 4:14,19 5:2 59:1 73:13 103:10,21 104:17 109:24 132:23 133:24 134:3 137:12 147:14 162:6,10,11 164:12 168:14 turns 53:19 141:15 151:21 167:6 tuttle 193:5,9,11 193:18 tuttle's 194:14 tweed 9:9 twice 123:20 twist 33:8 two 12:11 19:3 23:11 40:5 41:14 45:13 46:2 47:21 47:21 49:25 51:17 53:7 55:17,23 57:6 59:2 63:5 64:6,16 75:5 77:12 85:14 92:21 103:8 113:21 117:9 121:8,14 127:21 134:15 137:3 139:21 146:12 148:15 149:10 150:23 156:3 177:16 182:10 198:13	199:3,21 type 32:8,15 60:16 94:2 114:19 117:3 128:9 137:5 194:2 199:2,23 types 14:2 185:23 186:4 typically 148:14 u u.s. 1:23 138:20 u.s.c. 2:8 5:17 6:16 ucc 17:18 18:21 42:6,7,19 45:10 45:18 48:19 51:8 51:19 68:2,3 76:2 80:20,21 81:3 82:23 ultimate 26:3,19 42:7 47:5 51:23 ultimately 13:17 31:5,10 41:4 53:14 60:22 68:16 79:3 82:20 102:23 181:14 unable 102:4 171:25 unambiguous 38:19 74:15 75:22 unclear 57:22 60:16 110:21 underlies 41:5 underlying 48:4 80:4 163:6 164:17 168:3 underscores 33:13 undersecured 88:5 understand 24:22 24:24 25:24 26:1 26:14,17 30:15 34:24 36:8 41:2
--	---	---	--

46:10 55:13 62:21 64:18 73:5 85:17 90:8 93:7,17 94:1 94:3 99:1 108:12 114:15 119:13 122:7,9 134:7 138:15 142:11 143:17 159:15 161:3 173:3 174:16 177:6 178:14 understanding 38:4 50:2 69:11 69:15 71:9 72:24 140:3,5 149:9,10 153:3 171:23 understandings 177:17 understood 28:15 36:10 37:13 39:11 75:13 85:25 96:5 99:13 174:15 undertake 116:3 undisputed 23:19 77:4 108:1 123:9 unexpired 6:8 176:9 unfortunately 150:22 unique 106:9 unit 4:18,21,25 5:3,6,11,14 9:17 10:2 103:13 104:5 161:25 united 1:1,12 162:19 unites 52:9 unknown 1:25 unnecessary 91:15 unpaid 175:17 unrebutted 151:9	unscrubbed 131:10 unsecured 3:16 3:22 4:8 14:17 16:24 50:3 88:5 133:6 196:19 unusual 83:11 update 12:7 14:16 172:9 181:8 upper 43:18 urban 180:18 urge 46:5 67:2 urgent 164:2 urging 185:24 usc 162:13 163:11 use 4:3,11 17:20 35:19 47:1,2 51:10,12 52:22 63:6 68:5 80:25 81:18 82:10,14 83:1 87:20 88:14 88:19 90:12 91:3 91:9,16 92:10 94:15 97:18,20 98:1,22 108:8 114:4 123:19,20 124:7,8 126:4 140:2 172:2 195:18 uses 83:24 117:17 153:1 166:7 usual 74:15 75:22 utility 32:9	vehicle 86:13 vein 17:23 vendor 38:7 72:14 vendors 72:17,25 vendor's 38:2 venture 75:6 verbiage 108:9 verify 160:4,5 verifying 131:15 veritext 201:20 version 80:21 versus 114:20 147:25 179:4 180:18 vi 75:9 view 15:9,9 21:13 43:19 53:14 59:18 59:19 89:4 107:10 125:9 144:12 153:23 179:22,25 180:12 189:2 viewed 39:24 views 59:17 vigorous 17:17 village 123:13,16 124:18,18 141:20 143:24,25,25 144:2,12,14,18,22 144:24 145:3,4,14 145:19,25 146:12 146:14 148:9,17 149:4,9,11,11,12 150:1 151:5,20,21 152:4 153:14,15 154:19 155:22,25 156:9,23,24 157:5 157:7,13 160:3,4 160:7,19,22,22,25 162:8,8 164:8 165:24 168:8,23 169:6,11,15 village's 149:15 155:19 159:25	villages 150:2 viny 11:22 violate 25:2 39:15 violated 85:3 168:2 violation 85:6,10 164:12 187:8 virtue 50:17 vladimir 11:5 voided 106:13 vulcan 75:17 w wait 15:8 28:4 186:18 198:12 waited 34:9 waiting 133:4 146:14 192:6,7 waive 188:4,23 189:12 190:16,16 waiver 98:13 165:3 waives 197:12,16 waiving 88:4 walk 120:9 157:14 walmart 119:25 wander 11:23 want 12:10 14:12 22:12 33:24 34:23 42:20,22 45:19 46:2,16 53:6,7 54:17 58:5 62:8 65:22 68:23 71:18 87:1,21 92:5 94:12 96:17 101:11 103:22 115:21 116:4,18 119:15 123:19 132:18 133:20 141:2 142:20 144:7 146:1,17,20 147:4,9,11 155:10 157:15 159:23 161:23 168:8,11
	v v 74:8,13,17,24 75:1,6,9,17 valid 17:2 validity 117:24 value 35:1 76:13 76:24 100:15,15 various 25:10 vedder 10:8 144:17		

[want - working]

Page 50

168:13 172:7 178:3,5 179:20 190:3 wanted 13:24 18:24 23:8 28:12 29:8 36:10 37:13 37:15 39:10,12,23 40:3 68:11 97:9 97:13 114:9,10 175:5 193:6,14 wants 87:13 118:3 126:10 142:8 ward 180:25 warehouse 6:11 warrant 192:25 warren 170:11 waste 88:9 140:17 wasting 93:6 watching 155:22 water 102:18,19 103:3 waterfall 16:3 17:13 102:17 way 14:23 15:5 18:11,12 19:7 21:2 29:5 38:10 49:18 56:20 86:16 93:2 97:23 100:6 100:22 107:6 116:25 129:24 131:17 136:5 144:19,22 145:8 145:23 148:8,25 149:22 150:15 151:11 154:19 161:1 170:1 178:18 179:22 180:3,5,25 ways 19:3 64:6 we've 72:6 73:6 86:9 91:12,22 100:25 102:14 111:5 123:5 125:1	125:1 131:5 133:16 139:19,20 141:7 148:14 149:1 151:13 155:7,15,16,21 156:21 171:22 172:11,16 173:17 181:23 188:12 192:6 193:22 wearing 160:19 week 17:24 20:18 37:10 66:11 115:10 173:13 weeks 14:16 19:8 167:8 171:16 172:1 weight 137:9 weil 8:3 12:5 15:20 18:16 23:6 103:7 132:3 170:3 174:10 188:19 190:25 welcome 65:21 went 24:1 34:10 37:3 117:17 122:15 142:21 151:3 152:7 weren't 45:15 west 9:18 we'll 14:6 16:24 19:7 we're 16:16 18:9 20:1,10 21:22,25 25:4,12,18 28:4 29:12 36:4,16,25 43:5 66:10,10,11 we've 14:25 17:15 18:19,22 19:2,4,6 23:11 24:25 28:4 29:15 33:11 40:2 41:17 46:8 58:3 58:16 59:8 60:14	whatsoever 90:18 151:15 what's 15:4 24:19 44:20 61:18,18 66:15 67:6 white 1:14 who've 147:19 william 6:10 11:4 172:21 willing 25:4 58:20 173:4 188:4,22 189:11,12 197:20 wilmington 4:1,5 4:9 7:6 8:20 17:25 87:10,17,19,23 182:8,10,22 183:9 184:7 win 165:16 192:12 wind 14:19 15:4 18:10,11 99:9 winddown 94:13 94:15 95:3 97:25 98:2,3,19,25 99:4 100:1 101:13,25 windfall 121:1,3,5 150:11 winners 7:10,11 185:8,10,12 winning 165:16 wish 15:19 90:17 117:15 wishes 153:25 wishful 166:10 withdraw 169:21 withdrawn 97:19 193:7 withdrew 193:20 withheld 41:20 50:8 54:22 68:15 withhold 46:17 148:21 withholding 39:14 68:12	withstanding 135:4 witness 28:24 130:20 witnesses 28:20 139:21 wl 74:17,25 75:17 women 150:23 wonderful 147:19 won't 13:9 word 44:7 48:8 53:14 68:18 83:24 101:20 114:9 117:17 126:5,6,24 128:2 words 26:7 33:8 35:24 74:16 75:23 83:23 100:23 106:25 126:3 169:24 176:18 177:8,16 190:3 191:14 work 13:19 14:6 15:13,23 19:25 20:13 25:12,18,25 72:2 86:11 92:16 94:18 95:8,10 102:7,13,21 103:5 114:18 124:24 152:14 153:10,11 169:10 173:17 198:4 workable 18:10 worked 20:7 25:2 62:18 114:18,21 118:12 148:25 150:22 workers 167:16 working 12:14 15:2 20:1 71:2 73:19 86:5 154:8 174:9
--	--	---	---

[works - zachary]

Page 51

works 71:19 92:25 124:4 144:19,22 145:11 world 49:19,25 176:24 177:5,7 179:16 180:11 185:25 worldcom 163:14 worth 72:19 181:5 191:6 worthwhile 199:22 wouldn't 17:17 34:5 wound 15:12 wrap 16:1 write 71:18 written 55:23 145:9,23 wrong 43:2 149:15 165:8 wrote 91:17	190:19 year's 109:2 118:6 123:24 161:21 190:9 years 118:6 128:16 133:1 135:8 137:4 138:12 148:15 155:13,15 157:4 168:17 196:2 199:3 yield 75:15 york 1:2 8:6,15,22 9:5,12 10:11 you'd 61:8 you're 19:17 21:7 22:6 35:25 36:20 36:22 40:4 43:4 52:16 65:23 66:24 147:6 you've 14:3 46:15 59:17 63:10,15
x	z
x 1:4,10	zachary 11:9
y	
yeah 13:13 26:8 26:20 119:22 126:18 141:6,25 145:15 157:3 171:21 175:14 179:14 year 63:21 113:22 120:22 123:12,20 123:23,24 124:7,8 124:10,22 130:5,6 147:23,24,24,25 148:2,8,8,9,10,19 149:1,2,5,5,20,21 152:7 155:14 161:16 164:24 165:6,8 166:9 167:11 176:13 187:16 189:12	